# A False Sense of Security:
# The Potential for Eminent Domain Abuse in Washington

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William R. Maurer
Washington Policy Center Adjunct Scholar and
Executive Director of the Institute for Justice Washington Chapter

**December 2006**

WASHINGTON
POLICY CENTER

December 2006

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## Executive Summary

In the 2005 *Kelo v. New London* decision, the U.S. Supreme Court ruled that the U.S. Constitution does not prevent state and local governments from seizing homes and small businesses and transferring them to private developers to build luxury condominiums and big-box stores. The opponents of eminent domain reform in Washington State say that *Kelo* does not apply here and that the Washington Constitution protects us from the kinds of abuse that occurred in *Kelo.* They are wrong. Unfortunately, Washington law is rife with opportunities for eminent domain abuse.

For example, here are three ways government officials may abuse eminent domain under current state law.

- Municipal officials in Washington are already attempting to declare as "blighted" perfectly fine neighborhoods for potential redevelopment.

- In Washington, the government may seize more property than it needs so long as there is some aspect of public use involved somewhere in the project. This allows a local government to become a real estate speculator with any portion of condemned property not devoted to public use.

- State and local officials may also use their eminent domain powers to deliberately target properties that are not upscale enough for their liking, even when these properties are not necessary to achieve a public use.

What's more, condemnation determinations can take place at secret meetings where the sole notice to the property owner consists of a posting on an obscure government website. Until these aspects of Washington law are reformed, local governments can forcibly take property from citizens by abusing eminent domain as badly as New London officials did in *Kelo.*

# I. Introduction

Private property is the foundation of a free society. Property rights give citizens the means to defend all their other rights from the encroachments of government or the incursions of others.

Property gives people the means to pursue their dreams and live their lives the way they choose. Private property also provides people with the ability to help others, through their time and voluntary giving. When government takes property through the abuse of its eminent domain power, it makes it harder for citizens to defend their rights, pursue their dreams or help others.

Governments may constitutionally acquire property to serve an essential public use, but officials should limit such seizures to an absolute minimum. Most people gain their property through hard work, long hours, patience, careful planning and voluntary negotiation rather than force. When government officials respect property, they respect the people who earned or created it.

On June 23, 2005, the U.S. Supreme Court issued its notorious decision in *Kelo v. City of New London, Connecticut.*[1] This decision held that the City of New London could condemn private property and transfer that property to other private entities in order to promote "economic development," increase the city's tax base, and meet the "diverse and always evolving needs of society."[2] The decision effectively removed any federal impediment to eminent domain abuse. The public's response to that decision was immediate, strong, and almost uniformly negative.[3]

Under both the U.S. and Washington constitutions, the government may only condemn property for a "public use." Historically, public use meant things actually owned and used by the public – roads, courthouses, post offices, etc. Increasingly, particularly over the past 50 years, the definition of public use has been blurred by the courts to the point that the public use restriction has become no restriction at all.

Property is routinely transferred by force from one private person to another in order to build luxury condominiums and big-box stores. Between 1998 and 2002, the Institute for Justice found that there were more than 10,000 actual or threatened condemnations for private development across the country.[4] After *Kelo* was decided, local governments across the United States went on an eminent domain abuse spree, even as much of the country reacted with revulsion to the Supreme Court's decision.[5]

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[1] *Kelo v. City of New London, Connecticut,* 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005).
[2] *Id.* at 2662.
[3] *See Testimony of Steven Anderson, Castle Coalition Coordinator, Institute for Justice, Before the House Subcommittee on Commerce, Trade and Consumer Protection,* 108th Cong. (2005) (*available at* http://energycommerce.house.gov/108/hearings/10192005Hearing1637/Anderson.pdf ).
[4] Dana Berliner, *Public Power, Private Gain* 2 (2003).
[5] Dana Berliner, *Opening the Floodgates; Eminent Domain In the Post-*Kelo *World* 1 (2006) (noting that since the U.S. Supreme Court issued the *Kelo* decision, local governments threatened eminent domain or condemned at least 5,783 homes, businesses, churches and other properties so that they could be transferred to another private party).

Many people in Washington wondered what impact the *Kelo* decision could have here in Washington State. Some commentators argued that this decision was essentially meaningless in Washington, that we were not a *Kelo* state, and that our state constitution's protections adequately protect Washingtonians from the kind of abuse we saw in New London.[6] These commentators are wrong.

While the Washington Constitution does contain clear and unambiguous protections for private property, these protections have been gutted by our state's judges. Many state laws provide the government with procedural cover with which to carry out eminent domain abuse. Although eminent domain abuse in this state has neither been as egregious or commonplace as it has in some other states, it has still occurred and it has done so under the very constitution and state laws municipalities, developers and their lobbyists and attorneys assure us prevent this type of abuse.[7]

What Washington citizens have now is a false sense of security, not real protections from losing their property through eminent domain abuse. The Washington Supreme Court has demonstrated that it is not interested in enforcing the Constitution as it is written. Local governments realize that our courts have no stomach for keeping them within constitutional limits, so they continue to erode our right to be secure in our homes and businesses. It is clear that to protect homes and small businesses in Washington, solutions must come from either the Legislature or the people themselves.

## II. Courts and the Legislature Have Gutted Constitutional Protections for Home and Small Business Owners

The power of eminent domain is awesome, so awesome that in the early days of this country, a U.S. Supreme Court justice described it as "the despotic power."[8] Quite simply, it is the power to remove residents from their long-time homes and destroy small family businesses. It is a power that must be used sparingly. In order to protect property owners, the Fifth Amendment to the U.S. Constitution provides: "[N]or shall private property be taken for public use, without just compensation."

Article I, section 16 of the Washington Constitution goes much further. It explicitly declares that:

"Private property shall not be taken for private use . . . ."

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[6] *See, e.g.,* Hugh Spitzer, "State's constitution, high court shields us from improper condemnation of property," *The Tacoma News Tribune*, March 19, 2006, at Insight 1; Alan D. Copsey, *The Effect of* Kelo v. City of New London *in Washington State: Much Ado About Almost Nothing,* Envtl. & Land Use Law 3 (Nov. 2005); Sharon E. Cates, *Supreme Court Affirms Economic Redevelopment as "Public Use":* Kelo v. City of New London, Foster Pepper & Schefelman News 4, 6 (Fall 2005) (*available at* http://www.foster.com/pdf/FPN_Fall2005.pdf).

[7] Berliner, *supra* note iv, at 207-10 (discussing condemnations for private gain in Washington State).

[8] *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 307 (C.C.D.Pa. 1795).

It further declares that:

> "the question of whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public."

Read together, these provisions plainly indicate that the nation's Founders and this state's constitutional drafters were not only wary of eminent domain, but also clearly committed to protecting private property rights.

Unfortunately, the ability to transfer property from one private owner to another under the Fifth Amendment was given ultimate endorsement in June 2005 by the Supreme Court in *Kelo*. As a result of this decision, every home, every church and every small business has lost the protection of the U.S. Constitution. According to a narrow five-four majority of the Court, the mere *possibility* that private property may be more profitable as something else is reason enough for the government to take it away. The *Kelo* decision signifies a fundamental shift in the sanctity of all our property rights – an entire portion of the Federal Constitution has been erased. Under *Kelo*, economic development is the only justification a local government needs in order to take its citizens' property.

There is one thing the Court did get right in *Kelo,* however – the justices recognized that states are free to enact their own property rights protections. States can also make sure the law that currently exists actually provides home and small business owners with the security that they can hold on to their property. Unfortunately, the courts have eroded the protections for property in the Washington Constitution. Decisions such as *Miller v. Tacoma,*[9] *Hogue v. Port of Seattle,*[10] *State ex. rel. Washington State Convention and Trade Center v. Evans,*[11] and recent decisions concerning the Seattle Monorail,[12] Sound Transit,[13] and the City of Burien[14] have reduced the Washington Constitution's protections.

The Revised Code of Washington also contains numerous statutory opportunities to neutralize what protections the Washington Constitution does continue to provide. Without legislative reform, either by our elected officials or by the people themselves, Washingtonians remain at risk for eminent domain abuse.

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[9] *Miller v. City of Tacoma,* 61 Wn.2d 374, 378 P.2d 464 (1963).
[10] *Hogue v. Port of Seattle,* 54 Wn.2d 799, 341 P.2d 171 (1959).
[11] *State ex rel. Washington State Convention and Trade Center v. Evans,* 136 Wn.2d 811, 966 P.2d 1252 (1998).
[12] *In re Petition of the Seattle Popular Monorail Authority,* 155 Wn.2d 612, 121 P.3d 1166 (2005).
[13] *Cent. Puget Sound Reg'l Transit Auth. v. Miller,* 156 Wn.2d 403, 128 P.3d 588 (2006).
[14] *City of Burien v. Strobel Family Invs.,* 2006 Wash. App. LEXIS 1136 (June 12, 2006).

## III. Opportunities for Eminent Domain Abuse in Washington

### A. Blight: Anything the Government Says It Is

#### 1. Washington's Blight Laws

In *Miller v. City of Tacoma,* the Washington Supreme Court held that condemning "blighted areas" for redevelopment and transfer to private entities does not violate the prohibition against private takings in Article I, section 16.

When most people think of blighted areas, they think of neighborhoods afflicted with objective, concrete problems so serious that the property itself negatively impacts the safety or health of the surrounding community. Included in this would be properties that were dilapidated, unsanitary, unsafe, vermin-infested, hazardous, vacant or abandoned. However, Washington law does not limit the definition of "blighted areas" to only threats to public health or safety. Indeed, the definition of "blighted areas" is so broad under current law that practically every neighborhood in Washington could be considered a "blighted area." From Seattle's posh Capitol Hill to Spokane's middle-class neighborhoods, any group of homes can be targeted for acquisition by local governments.

Washington's Community Renewal Law, Title 81 of Chapter 35, states that the exercise of the eminent domain power under that chapter is for a "public use" and grants to municipalities the power of condemnation for "community renewal of blighted areas." RCW 35.81.080.

Under Washington's Community Renewal Law, any property that constitutes "an economic ... liability" may be condemned and transferred to a private developer.[15] This standard combined with the purpose of the Community Renewal Law, which is the elimination of areas that "contribut[e] little to the tax income of the state and its municipalities,"[16] creates the exact conditions that New London officials used to justify their taking of private homes in *Kelo*. Put another way, under Washington law, the Fort Trumbull neighborhood of New London was blighted because it constituted an economic liability and contributed little to the tax income of the state and its municipalities. Thus, the taking in *Kelo* can easily be duplicated in Washington State, although it must occur under the auspices of the Community Renewal Law.

The "economic liability" standard is not the only vehicle for eminent domain abuse provided by the Community Renewal Law. "Blighted area" is defined in state law (Revised Code of Washington 35.81.015(2)) to mean an area that is afflicted with a range of "problems," many of which are outside the control of residents. Many innocuous things constitute legal blight. For instance, property is blighted if there is "diversity of ownership." That is, if you own your home and your neighbor owns her home, your property is blighted. Under this definition, cities and towns such as Mercer Island, Clyde Hill, and Medina are all blighted under state law.

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[15] Revised Code of Washington 35.81.015(2).
[16] Revised Code of Washington 35.81.005.

Other things constituting blight include "excessive land coverage," defective title, the "existence of persistent or high levels of unemployment," or anything that "substantially impairs or arrests the sound growth of the municipality or its environs." This last catch-all brings pretty much any property not covered by the previous definitions into the scope of the Community Renewal Law.

Property that "substantially impairs or arrests the sound growth of the municipality" will almost always be determined by government consultants. Given municipalities' fondness for using "blight removal" as a reason to take citizens' land for redevelopment, the Community Renewal Law provides a handy vehicle for them to avoid the restrictions in the Washington Constitution.

Moreover, this threat does not apply to just single properties. When the government designates an area "blighted," it can condemn all the properties in that area, even homes that are in perfectly fine condition. Thus, one blighted house in an otherwise successful neighborhood can bring a blight designation on all the houses in that neighborhood.[17]

### 2. Washington Municipalities are Increasingly Invoking the Community Renewal Law

The critics of eminent domain reform nonetheless argue that, *regardless of what the Community Renewal Law actually says*, homeowners and small businesspeople in Washington have nothing to fear from bogus declarations of blight by municipalities. One prominent commentator recently stated that, "so-called 'blight' such as inappropriate uses of land or buildings, excessive land coverage or uses that impair or arrest growth, would be 'insufficient to support a constitutional 'public use.'"[18]

Unfortunately, Washington's local governments do not agree. Recently, local governments have designated or threatened to designate as blighted perfectly fine working-class neighborhoods for exactly the reasons listed by reform opponents as being constitutionally insufficient to support a finding of blight. Since the Legislature failed to reform Washington law last session, municipalities have been busy either blighting or threatening to blight neighborhoods in the following Washington cities:

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[17] In *Miller v. City of Tacoma,* Mr. Miller argued that his property should not be included in the area designated "blighted" because it was not substandard. The Washington Supreme Court rejected Miller's argument, noting "Experience has shown and the facts of this case indicate that the area must be treated as a unit and that a particular building either within or near the blighted area may have to be included to accomplish the purposes of the act. It is not necessary that every building in such an area be in a blighted condition before the whole area may be condemned." *Miller,* 61 Wn.2d at 392 (quotation marks omitted).

[18] Spitzer, *supra* note vi (quoting *Miller v. City of Tacoma,* 61 Wn.2d at 386). However, in *Miller v. City of Tacoma,* the court specifically said that it was not deciding whether standards such as inappropriate use of land, excessive land coverage, and uses that impair or arrest economic growth in the municipality were sufficient to constitute "public use": "We find it neither necessary nor proper to pass upon these considerations . . . ." *Miller v. City of Tacoma,* 61 Wn.2d at 386 (emphasis added). Instead, the court in *Miller v. Tacoma* found that other, less ephemeral, standards supported a finding of "blight" in that case. *Id.* The supreme court noted only that the "impairment of growth" standard "may also be suspect as insufficient to support a constitutional 'public use.'" *Id.* (emphasis added).

***Auburn:*** On September 18, 2006, the City of Auburn designated a large chunk of the city's beautiful downtown as blighted and adopted a Community Renewal Plan. Despite assurances from the mayor that the City will not forcibly displace anyone, the Plan includes a Residential Displacement Plan that leaves open the possibility of the City's use of eminent domain.[19] The City blighted block after block for "inappropriate use of land or buildings," "excessive land coverage," and "obsolete platting or ownership patterns." The City's Manager of the Department of Planning and Community Development explained that blight "means anything that impairs or arrests sound growth."[20]

***South Seattle:*** Seattle's Southeast District Council and the City of Seattle are currently considering using the Community Renewal Law in Seattle's Rainier Valley, the heart of the city's vibrant minority community. The City has proposed to declare the highly diverse, multi-ethnic community blighted and then implement various "community renewal projects" in the area. The earliest slated projects include the construction of "Town Center" and "urban village" developments with private residential and commercial uses around the sites of two planned Sound Transit stations.

Seattle has acknowledged that it would need to "assemble property" for the projects and that it might use eminent domain to do so.[21] The conditions listed by the City in its draft blight study as justifying use of the Community Renewal Law include above average rates of unemployment, poverty and crime.[22] The City's draft blight study makes clear that the City views the economic and employment status of its residents as a potential justification to condemn homes and businesses and force relocation. The City's failure to control crime in the area may also be sufficient to deprive the area's residents of their homes and businesses.

***Renton:*** Through the spring and summer of 2006, residents of Renton's working class Highlands neighborhood fought a long battle to keep their homes and businesses from being declared blighted by the City. A low-income, ethnically-diverse neighborhood close to the Boeing and Paccar plants, the Highlands became part of Mayor Kathy Koelker's vision for the "next generation's new single-family housing."[23] The City Attorney listed one of the reasons why the

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[19] Auburn, Wa., Ordinance 6049 (September 18, 2006).

[20] Mike Archbold, *Downtown renewal plan approved: Auburn council members heard from public, voted unanimously for plan,* King County Journal, Sept. 20, 2006, at http://kingcountyjournal.com/apps/pbcs.dll/article?AID=/20060920/NEWS/609200314&SearchID=73260964649909 (retrieved October 25, 2006).

[21] Southeast Neighborhood Investment Initiative (SNII) Planning Group, *DRAFT Southeast Seattle Community Renewal Plan* (Sept. 11, 2006) (on file with the Institute for Justice Washington Chapter).

[22] City of Seattle, Office of Policy & Management, *Southeast Seattle Determination of Blight Study,* at 13 (October 2006) (on file with the Institute for Justice Washington Chapter).

[23] *Quoted in* Dean A. Radford, *Highlands face a blight future, King County Journal*, February 27, 2006, at http://kingcountyjournal.com/apps/pbcs.dll/article?AID=/20060227/ARC/602270306&SearchID=73260965744629 (retrieved October 25, 2006).

Highlands would be blighted—the homes there were worth less than homes in other parts of Renton.[24] Residents and members of the City Council fought back against the Mayor.[25] After a long and painful process, the residents of the Highlands convinced the Council to kill the Mayor's plan, meaning their homes are safe for the time being.[26]

These examples demonstrate that local governments are increasingly using the Community Renewal Law to blight or threaten to blight working-class neighborhoods with the idea of tearing down the homes and transferring the property to developers to build "urban villages." "It can't happen here" is becoming "it is happening right now."

3. Fixing Washington's Community Renewal Law

If, as the critics of reform claim, numerous sections of the Community Renewal Law cannot be constitutionally applied, these provisions should be removed immediately from the Revised Code of Washington. Both municipalities and property owners should have a clear understanding of what municipalities may and may not do. Nonetheless, in last year's Legislative Session, municipalities resisted making any alterations to the state's eminent domain laws, suggesting that local governments believe that these provisions give them important tools with which to achieve their urban "visions."

Moreover, if these provisions cannot be constitutionally applied and they remain on the books, the best that can be said for the arguments of the critics of reform is that they provide a defense to an unconstitutional taking. This can be cold comfort for those facing a mandatory eminent domain proceeding, given that historically eminent domain has been applied against those that do not have the economic or political means to oppose condemnation.[27] Thus, for the poor, the elderly, and racial and ethnic minorities, reassurances that they may ultimately prevail in court against a municipality and its phalanx of high-priced attorneys after years of litigation are probably less than comforting.

Until Washington's Community Renewal Law is substantially revised to cover only concrete, objective harms, reassurances are meaningless, especially in light of the increasing use of the Law by municipalities. Under the Community Renewal Law, working-class neighborhoods may find themselves designated as "blighted areas" because city hall believes that they are impairing the "sound growth of the municipality." Just ask the residents of Auburn, the

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[24] Ibid.

[25] Jamie Swift, "Highlands residents fight against city's plans: Some fear Renton will use eminent domain to make them leave," *King County Journal*, June 24, 2006, at http://kingcountyjournal.com/apps/pbcs.dll/article?AID=/20060624/NEWS/606240321&SearchID=73260966110248 (retrieved October 25, 2006).

[26] Dean A. Radford, "Renton will not condemn Highlands property: City Council follows mayor's recommendation," *King County Journal*, July 19, 2006, at http://kingcountyjournal.com/apps/pbcs.dll/article?AID=/20060719/NEWS/607190316&SearchID=73260966110248 (retrieved October 25, 2006).

[27] *See The* Kelo *Decision: Investigating Takings of Homes and other Private Property: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. (2005) (statement of Hilary Shelton, Director, NAACP Wash. Bureau) (noting that condemnation for blight has traditionally been applied against those without the political or economic means to fight back).

Rainier Valley, and the Renton Highlands. Revision of this incredibly broad statute should be a priority for policymakers wishing to protect homes and small businesses in Washington.

### B. The "Necessity" Determination: Extreme Deference Leads To Extreme Abuse

#### 1. Washington Law Allows the Government to Take More Land Than it Needs for Legitimate Public Uses

In the *Monorail* decision, the Washington Supreme Court held that the Seattle Monorail, or any other governmental entity in Washington, could take more property than is necessary for an identified public use and transfer any remainder property to private entities so long as the project contains some aspect of public use in it.

The Court also ruled that municipal officials can seize property when they do not have any identified use for property, public or private, because that is not a "private" taking, just a speculative one. In essence, the *Monorail* decision permits the government to transfer private property to private entities so long as the government can manufacture a fig leaf of public use or possible public use to give it constitutional cover.

The *Monorail* decision is not only constitutionally unsound, it is terrible public policy. It gives municipalities an incentive to condemn more property than is needed on the chance that it may get to play real estate speculator with any property left over from the legitimate public use. It also gives the government incentive to condemn as much land as possible as *early* as possible in a project, again to maximize the chance that it may have leftover property to sell or to use to reward politically connected supporters. The *Monorail* decision should be fixed if for no other reason than to remove these perverse incentives.

To fix the problems created by the *Monorail* decision, the Legislature would need to address the treatment of "necessity" in Washington law. For a condemnation to be valid under Washington law, the government must prove that: 1) the use is public; 2) the public interest requires it, and; 3) the property appropriated is necessary for that purpose.[28] The determination of "necessity" essentially means the selection and extent of the property to be condemned and this decision is left almost entirely to the discretion of the government. Courts will not overturn a determination of necessity unless the property owner can demonstrate fraud or constructive fraud in the necessity determination—thus, courts almost never overturn a necessity determination.

This gives municipalities free rein to condemn more land than is necessary for longer than is necessary or to simply reshuffle properties in a project to achieve the desired result without actually committing a private taking—instead of putting a hotel on someone's house, the government puts the road serving the hotel there and puts the hotel across the street. It provides clever planners with all the tools they need to avoid the prohibitions of Article I, section 16.

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[28] *King County v. Theilman,* 59 Wn.2d 586, 593, 369 P.2d 503 (1962).

### 2. Washington Law Allows the Government to Condemn Land That is Not Upscale Enough

To see the potential for abuse inherent in the overly deferential "necessity" standard, one need only look to the City of Burien in its efforts to condemn property owned by seven sisters in the City's downtown. The Strobel family's ordeal began when Burien decided to build a new development—upscale condos, shops, restaurants and offices – around the property the sisters inherited from their parents, who passed away in 1998. For nearly two decades, their parents had leased the property to Meal Makers, a diner-style restaurant popular with Burien locals, particularly seniors. The sisters, who hold the property in trust as Strobel Family Investments, maintained the lease with Meal Makers.[29]

Burien decided the Meal Makers building wasn't upscale enough for the Town Square development, however, so the City condemned it. Because the area had not been declared "blighted," simply condemning the property and turning it directly over to the City's Los Angeles-based developer would have been politically unpopular and an illegal "private taking" forbidden by the Washington Constitution, even to the most deferential jurist. So Burien came up with a scheme. It would plan a road—an ostensibly public use for which eminent domain is authorized—right through the Meal Makers building.

The City Manager told his staff to "make damn sure" the road went through the building.[30] The staff complied, developing a plan that appeared to run the road over the Strobel family's property.[31] When a subsequent survey revealed that the road would impact only a small corner of the property,[32] the staff developed yet another site plan that put the road right through the building.[33] The City then condemned the Strobel family's property.[34]

A King County Superior Court judge noted that the road "could have been easily accomplished without [a]ffecting the Meal Makers restaurant or the Strobel property."[35] He described the City's condemnation decision as "you won't sell and you don't fit our vision, so we're going to put a street right through your property and condemn it."[36] He further suggested that the City's condemnation might be "oppressive" and an "abuse of power."[37] Nevertheless, the judge concluded he must allow the condemnation given the incredibly deferential standard

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[29] Stuart Eskenazi, "Home-away-from-home v. development," *The Seattle Times*, April 16, 2005, at http://seattletimes.nwsource.com/html/localnews/2002243254_mealmakers16m.html?syndication=rss (retrieved November 1, 2006).

[30] Deposition of Larry Fetter, at 33, 36 (August 2, 2005) (on file with Institute for Justice Washington Chapter).

[31] Burien Resolution 201 (October 18, 2004).

[32] Declaration of David Wright, at 3 & Ex. B (July 7, 2005) (on file with Institute for Justice Washington Chapter); *see also* Deposition of Gary Long, at 76 (July 7, 2005) (on file with Institute for Justice Washington Chapter).

[33] Declaration of David Wright, at 3 & Ex. C (July 7, 2005); e-mail from Stephen Clark to David Cline (Nov. 9, 2004) (on file with Institute for Justice Washington Chapter); Burien Resolution 208 (Jan. 24, 2005).

[34] Burien Ordinance 426 (February 7, 2005).

[35] King County Superior Court, Verbatim Report of Proceedings, at 35 (August 5, 2005) (on file with Institute for Justice Washington Chapter).

[36] Ibid, 37.

[37] Ibid.

Washington courts apply in reviewing "necessity." As the judge put it, he was bound to uphold the condemnation unless there was proof of fraud.[38] The Court of Appeals affirmed.[39]

The Strobels petitioned for review to the Washington Supreme Court, who denied their petition on December 5, 2006.

The court's failure to correct this abuse makes it imperative that the Legislature can take steps to ensure that any property taken by the government is necessary to accomplish the public use associated with the project and that courts should not completely defer to the government's determination of necessity. Washington's citizens should not be deprived of their property simply because the government thinks it is not upscale enough. The standard found in early Washington cases addressing "necessity"—that a property will not be found to be necessary for a public use if the government's inclusion of that property in the project constitutes "bad faith," "oppression," or "an abuse of . . . power" should be codified by the Legislature.[40] This will provide some protection from excessive condemnations while permitting the state and municipalities sufficient latitude and flexibility to structure legitimate public use projects.

### 3. Washington Law Permits "Necessity" Determinations to be Made Essentially in Secret

The Washington Supreme Court has indicated that, absent evidence of fraud, it will not make any substantive review of a municipality's "necessity" determination, meaning that the only input a property owner has regarding whether his or her property is "necessary" for a public project is in the legislative phase.[41] However, the Washington Supreme Court has also made clear that these determinations can be made essentially in secret, with notice provided only in difficult-to-find areas of governmental websites—assuming, of course, that one has access to a computer.

In *Sound Transit v. Miller,* the Washington Supreme Court held that Internet notice concerning the legislative determination of the necessity of an exercise of eminent domain satisfies statutory notice requirements because the Internet provides relatively unlimited low-cost capacity for communications of all kinds.[42] This conclusion rests upon a mistaken factual assumption: that the Internet is easily accessible by all members of society. The Washington court's decision assumed there is no "digital divide" between rich and poor, ethnic majorities and minorities, young and old.

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[38] Ibid, 35.
[39] *City of Burien v. Strobel Family Invs.*, 2006 Wash. App. LEXIS 1136 (June 12, 2006).
[40] *State ex rel. Postal Tel.-Cable Co. v. Super. Ct. of Grant County*, 64 Wash. 189, 194, 116 P. 855 (1911).
[41] Sound Transit argued before the Washington Supreme Court that because public use was assumed in that case, the trial court, in the public use and necessity hearing, did not need to hear any evidence offered by the Millers regarding the necessity of the taking. App. Br. at 4. After the court's decision in *Sound Transit v. Miller,* municipal governments will presumably continue to argue that, if there is some aspect of public use in a project, the property owner should not have an opportunity to present any defense to the government's condemnation.
[42] *Sound Transit v. Miller,* 156 Wn.2d at 415-16.

Studies conclusively demonstrate that the poor, minorities, and elderly have considerably less access to the Internet than other segments of society.[43] Research makes equally clear that these same segments of society are the most likely to be targeted by eminent domain.[44] Thus, *Sound Transit v. Miller* allows government to employ a form of notice that largely excludes the very communities with the greatest interest in necessity determinations.[45]

The courts have so far indicated that they prefer to abdicate their responsibility to review whether a particular property is "necessary" to achieve a public use. In such circumstances, effective notice of this legislative determination becomes essential to the open workings of government – otherwise, condemnation becomes a secret decision, secretly arrived at. Policymakers must ensure that the people most affected by legislative declarations of necessity actually receive some notice that their property may be condemned.

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[43] For instance, the U.S. Census Bureau reported that in 2003, a 62 percent gap in Internet access existed between households with $100,000 or more in family income and those with less than $25,000. Jennifer Cheeseman Day et al., U.S. Census Bureau, *Computer and Internet Use in the United States: 2003* 2 (2005). The problem largely stems from the fact that the poor, the elderly, and racial and ethnic minorities are far less likely to have computers in their homes. In fact, the Bureau found that while 62 percent of Americans had computers in the household, certain groups lagged well behind the rest of the populace:

> 35 percent of households with householders aged 65 and older, about 45 percent of households with Black or Hispanic householders, and 28 percent of households with householders who had less than a high school education had a computer. In addition, 41 percent of one-person households and 46 percent of nonfamily households owned a computer.

*Id.* at 3 (citation and footnotes omitted). High-income households, on the other hand, were much more likely to have computer and Internet access than the general public. *Id.* In Washington specifically, Internet access and computer use is not as ubiquitous as the Washington Supreme Court suggested: 60-65 percent of households have Internet access and 69-74 percent have a computer – hardly omnipresence. *Id.* at 5. Moreover, a report prepared by the City of Seattle Department of Information Technology noted that only half of the City's senior citizens were current computer users. Elizabeth Moore et al., City of Seattle Dep't of Information Technology, *City of Seattle Information Technology Residential Survey Final Report* 49 (2004). The report concludes:

> Seattle still has a significant digital divide. Older Seattleites or those with less income or education are less likely to be current or comfortable technology users . . . . Lower levels of connectivity are also evident among African American respondents, but the gap is not as pervasive as with the seniors and those with less income or education. The top two reasons for not having a computer at home are cost and lack of interest.

*Id.* at 87.

[44] Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain,* 21 Yale L. & Pol'y Rev. 1, 6 (2003).

[45] Indeed, even assuming one has access to the Internet, the court assumed an amazing amount of sophistication regarding accessing information there. For instance, a resident of Seattle faces potential condemnation from (at least) the United States Government (the Army Corps of Engineers, the Bonneville Power Administration), Washington State, King County, Sound Transit, the City of Seattle, Seattle City Light (for electric service), Puget Sound Energy, Inc. (for gas service), and, until recently, the Seattle Monorail. Half the senior citizens in the City do not have access to any of these entities' websites. The other half are expected to figure out within which jurisdictions they live, monitor the websites for those jurisdictions, and find the information concerning condemnation on the websites – a level of sophistication beyond the ken of even the most devoted government website enthusiast.

### C. Washington Law Permits the Government to Declare a "Public Use"

In *Hogue,* an otherwise good decision, the Washington Supreme Court first held that legislative declarations of public use are entitled to "great weight" by the court. This is in direct contrast to the explicit command of the Washington Constitution: "the question of whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public." The words of the Washington Constitution are plain and unambiguous – "without regard to any legislative assertion" does not, and cannot, mean "legislative assertions are entitled to great weight." But the court nevertheless thinks it does.

Unfortunately, this latitude has been abused because the government is confident that the courts will grant declarations of public use, no matter how spurious, "great weight." For instance, RCW 8.08.020 provides, with emphasis added, that "[a]ny condemnation, appropriation or disposition [by a county] shall be deemed and held to be for a county purpose and public use ... when it is directly or indirectly, approximately or remotely for the general benefit or welfare of the county or of the inhabitants thereof." Basically any condemnation undertaken by a county is therefore a public use and this formless declaration is entitled to "great weight" by the courts.

Even if the State Supreme Court gives it permission to do so, the Legislature should decline the invitation to ignore the Washington Constitution. Title 8 of the Revised Code of Washington would need to be reviewed to expressly declare that legislative declarations of public use by the state or any local government are not to be considered or given any weight by the courts.

## IV. Eminent Domain Reform is Overwhelmingly Supported by Voters

In the November 2006 election, voters across the country overwhelmingly approved ballot measures restricting governments from taking private property and giving it to private entities. Voters in South Carolina, Florida, Georgia, Michigan, New Hampshire, and North Dakota all approved constitutional amendments restricting eminent domain. Louisiana's voters approved a similar measure in September's primary. Nevada's voters preliminarily approved a constitutional amendment sharply restricting eminent domain as well, which will reappear on the 2008 ballot for final approval. Oregon passed a citizen's initiative that provides stronger statutory protections to property owners. Arizona's voters overwhelmingly passed an initiative that significantly restricts the definitions of "public use" and "blight" despite the fact that the initiative also contained a controversial "regulatory takings" provision similar to Washington's failed Initiative 933.

All of these measures passed by wide margins, with "yes" votes ranging from 55% in Louisiana to around 85% in South Carolina, Georgia, and New Hampshire. These provisions passed in "red" states, like Georgia and South Carolina, and "blue" states like Oregon and New Hampshire. While the country was otherwise often bitterly split on candidates and issues, this was one issue upon which voters overwhelmingly agreed. Where the public could vote on pure

eminent domain reform, they marched to the polls and demanded that the government protect their homes and businesses from abuse.[46]

Washington was not immune from this *Kelo* wave. While voters across the state were rejecting Initiative 933 (which again, dealt not with eminent domain, but rather with regulatory takings), Pierce County voters overwhelmingly approved amending Pierce County's charter to forbid the county government from condemning property for economic development. Pierce County's amendment also reined in the judiciary's deference to the County's "necessity" determination. Despite opposition from the Pierce County Executive, the amendment passed 70% to 30%.[47]

The people of this country have made their views known. Pierce County's experience shows that voters in this state are also greatly concerned that their property remains safe from eminent domain abuse. This is an issue that cuts across the political spectrum, uniting Democrats and Republicans, urban and rural, conservatives and liberals.

## V. Conclusion

Constitutional rights are only as strong as the courts that protect them. Our State Supreme Court is not protecting the homes and small businesses of Washington residents from government abuse. Without action, Washingtonians face a growing threat of eminent domain abuse. While much of the debate regarding eminent domain concerns abstract concepts of private property and public use, we should recall that eminent domain abuse does not harm property; it harms people.

Washington has the opportunity to join the dozens of other states working to protect the rights of its citizens by truly reforming eminent domain laws. It has a chance to reinvigorate the protections that have shielded Washington citizens from these abuses since the state's founding in 1889. It has a chance to ensure that the people of this state do not suffer the same fate as those across the country who have been subject to eminent domain abuse.

In the past, Washington has led the country in protecting the rights of its citizens. It is now lagging behind. It is time once more for Washington to reclaim its heritage as part of the vanguard of reform.

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[46] All election results are available at the Castle Coalition website, www.castlecoalition.org/legislation/ballot-measures/index.html. Voters in California and Idaho rejected efforts to ban eminent domain abuse that were wedded to restrictions on "regulatory" takings.

[47] www.co.pierce.wa.us/pc/abtus/ourorg/aud/elections/misc/currentresults.htm.

## About the Author

**William R. Maurer** is an adjunct scholar of the Washington Policy Center and the executive director of the Institute for Justice Washington Chapter (IJ-WA), which he joined in 2002. Prior to joining IJ-WA, he was an attorney in the Bellevue, Washington, office of Perkins Coie LLP, where he practiced complex administrative litigation, regulatory law, and appellate litigation. He served as a law clerk for Justice Richard B. Sanders of the Washington Supreme Court and Justice Victoria Lederberg of the Rhode Island Supreme Court. He is a chapter author for reference books on Washington's Public Records Act and the interaction of administrative law and the federal Civil Rights Act.

He is a graduate of Bard College and the University of Wisconsin – Madison Law School, where he was an articles editor of the *Wisconsin Law Review.*

IJ-WA represented the Strobel sisters in their appeal to the Washington Supreme Court and submitted an amicus curiae brief in support of the property owners in the *Monorail* case. The national office of the Institute for Justice represented Susette Kelo in her challenge to New London's attempt to condemn her land.

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WASHINGTON LAW REVIEW
Volume 47, Number 4, August 1972

ARTICLES

# A GENERAL THEORY OF EMINENT DOMAIN

William B. Stoebuck*

Where to begin? That is the question whenever one traces the origin and development of any particular set of ideas. There is, of course, some famous, if very light, judicial precedent that one should, "Begin at the beginning, and go on till you come to the end: then stop."[1] "The beginning," alas, is a point unattainable by those of us who are neither speculative philosophers nor inspired prophets. Nor, perhaps, do ancient beginnings matter much in our present inquiry, except as a matter of curiosity.

Some claim the first recorded exercise of eminent domain power was King Ahab's seizure of Naboth's vineyard.[2] The internal facts, however, indicate the king had no such legal power, for he had to have Naboth stoned to death before he could make the vineyard his. In any event, there is no evidence that this Biblical incident contributed in the slightest to the American law of eminent domain, not even in Massachusetts Bay Colony in its most God fearing days.

One is curious, next, about Roman expropriation practice. We know about as much of this as we do of Naboth's vineyard. The principle of expropriation was never formulated by legislator or jurist. It is not even clear Rome exercised a power of compulsory taking, though some scattered bits of evidence suggest she did. The straight roads and aque-

* Professor of Law, University of Washington. B.A., 1951, Wichita State University; M.A., 1953, Indiana University; J.D., 1959, University of Washington.

1. The King of Hearts to the White Rabbit during the trial of the Knave of Hearts for stealing the queen's tarts. L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND, Ch. 12 (1901).

2. 1 P. NICHOLS, EMINENT DOMAIN 44 (rev. 3d ed. 1964); 1 *Kings* 21.

ducts suggest this, and there was on occasion appropriation of materials for aqueduct repair upon compensation.[3] Whether compensation was a regular practice is unknown. The one thing that is clear enough about Roman expropriation law is that its mysteries cannot have had discernible effect on our own practice.

Expropriation and compensation were both practiced in England during the entire American colonial period. However, as far as is known, no Englishman or American prior to the Revolution worked out a systematic speculative theory of eminent domain. John Locke gave a philosophical disquisition upon one aspect of the subject,[4] which was somewhat embellished by Blackstone.[5] The English to this day have not raised the subject of eminent domain to the imperative level at which it now exists in America. They do not even use the phrase "eminent domain," but instead, "compulsory acquisition," "compulsory powers," or "expropriation." Compensation may be said to be a constitutional principle, to the extent such can exist without a constitution. Modern English treatises on expropriation scarcely go back of the Lands Clauses Act of 1845, which was the first permanent, general statute on the subject.[6] Before that, the power to take and the duty to pay compensation were spelled out in each act that directed the particular project for which the taking would occur. The Lands Clauses Act has been largely replaced through the years by other acts of more or less general applicability.[7] In England the whole subject of what we call eminent domain is still a highly practical affair, attended by few of the abstractions with which we surround it.

We have come to regard eminent domain as a branch of constitutional law. The fifth amendment to the United States Constitution and the constitution of every state except North Carolina contain so-called eminent domain clauses. The now classic language of the fifth amend-

3. Jones, *Expropriation in Roman Law*, 45 L.Q. REV. 512 (1929).
4. J. LOCKE, ESSAY CONCERNING CIVIL GOVERNMENT 378-80 (P. Laslett ed. 1960).
5. 1 BLACKSTONE, COMMENTARIES *139.
6. *See* C. CRIPPS, COMPULSORY ACQUISITION OF LAND 9-27 (11th ed. 1962); T INGRAM, COMPENSATION TO LAND AND HOUSE OWNERS 1-3 (1864); D. LAWRENCE COMPULSORY PURCHASE AND COMPENSATION 75-84 (4th ed. 1967); W. LEACH, DISTURBANCE AND COMPULSORY PURCHASE 1-9 (2d ed. 1965); R. STEWART-BROWN, GUIDE TO COMPULSORY PURCHASE AND COMPENSATION 1-5 (5th ed. 1962). None of these treatises attempts to build up a history or general theory of taking or compensation, quite in contrast to many American works. The English authors treat the subject in an intensely practical way; they are concerned mostly with procedures.
7. The best concise discussion is in D. LAWRENCE, *supra* note 6, at 75-112.

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ment reads: "nor shall private property be taken for public use without just compensation." Twenty-six state constitutions allow compensation for property "damaged" as well as that "taken."[8] The "damaging" language has the effect of more or less facilitating compensation for certain non-trespassory takings, though every act for which compensation has been allowed as a damaging has, in some jurisdictions, also been compensated as a taking.

Because eminent domain has become a constitutional subject, it may not be generally realized that its principles also exist in judge-made law. The early constitutional eminent domain clauses themselves were made pursuant to an existing ethos shared by judges along with constitution makers. In other words, the principles we have come to think of as constitutional existed and exist also independently of written constitutions. There are some examples of this. *Gardner v. Trustees of Village of Newburgh*,[9] probably the leading early decision, written by Chancellor Kent, required compensation on natural principles at a time when there was no eminent domain clause in the New York constitution. Indeed, many American decisions, mostly up to about the Civil War era, explained eminent domain principles in natural law terms.[10] Even today the state of North Carolina has no eminent domain clause, but the state's supreme court has enunciated the principles and has been most liberal in applying them.[11] The United States Supreme Court has made compensation a requirement

8. "Damaged" or an equivalent word appears in the following state constitutions: ALA. CONST. art. XII, § 235 (applies only to damagings by municipal and private corporations and individuals); ALASKA CONST. art. I, § 18; ARIZ. CONST. art. II, §17; ARK. CONST. art. 2, § 22; CALIF. CONST. art. I, § 14; COLO. CONST. art. II, § 15; GA. CONST. art. I, § III, para. I; ILL. CONST. art. I, § 15; KY. CONST. § 242 (applies only to damagings by municipal and private corporations and individuals); LA. CONST. art. I, § 2; MINN. CONST. art. I, § 13; MISS. CONST. art. I, § 17; MO. CONST. art. I, § 26; MONT. CONST. art. III, § 14; NEB. CONST. art. 3, § 21; N.M. CONST. art. II, § 20; N.D. CONST. art. I, § 14; OKLA. CONST. art. II, § 24; PA. CONST. art. XVI, § 8 (applies only to damagings by municipal and private corporations and individuals); S.D. CONST. art. VI, § 13; TEXAS CONST. art. I, § 17; UTAH CONST. art. I, § 22; VA. CONST. § 58 (applies only to damagings by municipal and private corporations and individuals); WASH. CONST. art. I, § 16; W. VA. CONST. art. III, § 9; and WYO. CONST. art. I, § 33. The model for these provisions is the amendment to the Illinois constitution, adopted in 1870, intended to liberalize the allowance of compensation for loss of certain kinds of property rights, particularly street access. *See* Chicago v. Taylor, 125 U.S. 161 (1888), which reviews the history and purpose of the Illinois amendment.

9. 2 Johns. Ch. 162 (N.Y. 1816).

10. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931).

11. *See especially* Gray v. City of High Point, 203 N.C. 756, 166 S.E. 911 (1932); Hines v. City of Rocky Mount, 162 N.C. 409, 78 S.E. 510 (1913).

of due process, binding upon the states through the fourteenth amendment.[12]

In perspective, then, the constitutional eminent domain clauses are not ends in themselves, nor are they beginnings. They are formal, concise statements of principles recognized and enshrined, but not invented, by the constitution maker. The real significance and meaning of these principles, therefore, depends on the discovery of their historical and theoretical development, rather than solely on the interpretations of the constitutions. The purpose of this article is to develop a framework, based on that discovery, for analyzing the principles of eminent domain. It will impose order upon our inquiry if we organize it under the following heads: the act of taking, the compensation requirement, the public-purpose limitation, and the concept of property.

## I. THE ACT OF TAKING

In its first aspect, what we call eminent domain involves the transfer, in a prescribed mode, of property interests from one to another. Implicit in this is the notion of private property, which is necessary to make any transfer possible.

It is difficult to conceive of any society, even one composed of only two interacting persons, that does not recognize private property. If *A* has any claim to the clothes on his back that *B* does not, then *A* has private property. This and many similar rights must exist even in so-called communistic societies, such as the Shakers or the Utopians. Private property in land exists today in abundance in Russia. Everyone there has a special claim to his house or apartment, which, while it may not correspond to our concept of fee ownership, is quite close to the property interest we call leasehold. Private property exists in any society we can imagine, the only differences being in its nature and extent from one society to another. So, transfers are everywhere possible.

There are, of course, various modes for transferring property rights, differing somewhat from one legal system to another. The transfer

12. Griggs v. Allegheny County, 369 U.S. 84 (1962); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). The holdings in these cases were foreshadowed by a deliberate, though unnecessary, statement to the same effect in Chicago B. & O.R.R. v. Chicago, 166 U.S. 226, 233 (1897), and by weaker dictum in Holden v. Hardy, 169 U.S. 366, 389 (1898).





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involved in eminent domain has certain characteristics that distinguish it from other forms of transfer. First, it occurs between an individual and the state, or some alter ego of the state such as a public utility, with the state or the alter ego always being the transferee. As a consequence, it is accurate to think of the transferee-state as having enough of the nature of an individual to receive the same property right the transferor had. This is the basis for the statement that the state is viewed as an individual treating with another individual for an exchange.[13]

A second, and the most distinguishing, characteristic of the eminent domain transfer is that it may be compelled over the transferor's immediate, personal protest. The qualifying words "immediate" and "personal" are not usually found in discussions of eminent domain, but have been added here for a reason that will be spelled out in the ensuing exploration of the power to take. In some sense a power is involved, and it is a power belonging to the state. It is an act of the state in its capacity as sovereign. This implies, first, that eminent domain exists only in societies having sovereign governments, not, for instance, in the hypothetical microscosmic society of *A* and *B*. Of more practical importance, it implies that eminent domain transfers may occur only when the body politic is involved and chooses to exercise its power.

For a more detailed examination of the power involved in eminent domain, it will be convenient to consider the subject under two subheads. The first will deal with the origin and nature of the power to take, and the second will distinguish this from other powers of government.

### *A. Origin and Nature of The Power to Take*

One thin line of authority would have it that the power to retake land is impliedly reserved when land is patented out by the state. A "necessary exception in the title to all property," would be a typical formulation.[14] A more extreme statement would be that "the right of eminent domain is a remnant of the ancient law of feudal tenure."[15]

13. 1 BLACKSTONE, COMMENTARIES *139.
14. Donnaher v. State, 9 Miss. 242 (8 S. & M.) (1847). *See also* Cushman v. Smith, 34 Me. 247, 259-60 (1852), in which the court seems to mean the same thing in speaking of "title superior."
15. New York City Housing Auth. v. Muller, 155 Misc. 681, 279 N.Y.S. 299, 300 (1935).

The consequences of any such reserved-power theory would be most unsettling, even to courts that have referred to it. Presumably, no compensation would be required, nor would it be necessary to go through the elaborate judicial condemnation procedure. And government's power, being reserved in the original grant, seemingly would be prior to all encumbrances, such as easements or liens, the holders of which would not be entitled to compensation. None of these consequences occur in the decisions that dabble—for this is all they are doing—with the reserved-power theory.

A most obvious rebuttal to this theory is that it simply is not in accord with actual practice. With one exception, to be recorded below, there is no indication that any English or American government has in fact reserved any such power. For a court to create a fictional power would be to announce a rule of law, but that rule does not exist because it would produce consequences that, as just mentioned, do not occur. Moreover, it would not be possible for one government, such as an American state, to take land that had originally been granted by another government, such as the United States government or the British government. Nor would it be possible to condemn personalty, the ownership of which does not trace back to a governmental grant. The reserved-power theory, while it might be the basis for some imagined system of expropriation, does not explain our system.

There is one historical exception, in which a kind of reserved power did exist. When William Penn received his royal grant to Pennsylvania, he sold land subscriptions to "adventurers and purchasers" in England. His agreement with them was that, for lands they purchased in the countryside, they were to receive proportional lands in "the" city. In order that they could travel from country to city, Penn agreed to lay out roads from other towns to the city and from town to town.[16] But when the settlers reached Pennsylvania, "the" city, Philadelphia, was the only established town, so that the location of roads could not then be determined. So, in the original grants Penn granted six per cent additional land as his contribution for roads. The understanding was that the colonial government could thereafter take back without compensation such land as proved necessary for roads when their lo-

16. The agreement between Penn and the subscribers is contained in ACTS OF ASSEMBLY OF THE PROVINCE OF PENNSYLVANIA viii (Hall & Sellers printers 1775).





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cation was known. It was anticipated that some owners might subsequently lose more or less than six percent for roads, but this was agreed to as an inevitable consequence of the scheme. During the entire colonial period, therefore, and even into the federal period, Pennsylvania took land for roads without paying compensation. However, under a colonial act of 1700, compensation was given for the improvements on land.[17] Colonial Pennsylvania, then, provides the only known legitimate example of the reserved-power theory.

Our received wisdom on the subject of eminent domain is that it is an inherent and necessary power of all governments. A classic exposition is by the Supreme Court in *Kohl v. United States*,[18] in which the federal government was held to have eminent domain power because "such an authority is essential to its independent existence and perpetuity." This rationale certainly has the sanction of many judicial utterances.[19] It is the standard explanation adopted by the leading American commentators on eminent domain.[20]

This inherent-power concept traces back to the early speculative writers on eminent domain, the civil law jurisprudents Pufendorf,[21] Bynkershoek,[22] and Vattel.[23] Grotius, who is generally considered the father of modern eminent domain law and the originator of the term "eminent domain," speaks of the principle that "public advantage"

17. These matters are all reviewed in M'Clenachan v. Curwin, 3 Yeates (Pa.) 362 (1802), and Feree v. Meily, 3 Yeates (Pa.) 153 (1801). *M'Clenachan* held that, even in 1802, compensation was not required for unimproved land.

18. 91 U.S. 367, 371-72 (1875). Strangely, it was not until this decision that the federal government was clearly determined to have eminent domain power. Until they used the federal power to obtain land for the post office involved in *Kohl*, federal officials had apparently had state governments condemn land for federal purposes.

19. *See, e.g.*, United States v. Jones, 109 U.S. 513 (1883); Bonaparte v. Camden & A. R.R., 3 Fed. Cas. 821 (No. 1617) (D.N.J. 1830), Cairo & F.R.R. v. Turner, 31 Ark. 494 (1876); Sinnickson v. Johnson, 17 N.J.L.R. 129 (1839).

20. 2 J. KENT, COMMENTARIES ON AMERICAN LAW *339; 1 P. NICHOLS, EMINENT DOMAIN 18-23 (rev. 3d ed. 1962); Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954).

21. S. PUFENDORF, DE JURE NATURAE ET GENTIUM 1285 (C. and W. Oldfather transl. 1934). This work was originally published in 1672.

22. C. VAN BYNKERSHOEK, QUAESTIONUM JURIS PUBLICI 218 (T. Frank transl. 1930). This work was originally published in 1737.

23. E. DE VATTEL, THE LAW OF NATIONS 96 (C. Fenwick transl. 1916). This work was originally published in 1758. On the cited page Vattel also says: "It is even to be presumed that when a Nation takes possession of a country it only allows private property rights over certain things subject to this reserve." Taken alone, this language might seem to be the origin of the reserved-power theory discussed earlier. Perhaps it is the origin; however, Vattel's main thrust is that eminent domain is a governmental, not a proprietary, power.

should prevail over "private advantage."[24] Bynkershoek, the most incisive and complete of these early writers, stated their concept thus:[25]

> Now this eminent authority extends to the person and the goods of the subjects, and all would readily acknowledge that if it were destroyed, no state could survive . . . . That the sovereign has this authority no man of sense questions. . . .

In one sense, it might be said that a particular government has such authority if an agency with power to make a binding rule on the subject has so determined. The United States Government has the authority in that sense because the Supreme Court thus held in *Kohl v. United States*. The American states have the authority for the same reason. Neither the United States Constitution nor, as far as is known, any state constitution contains an express grant of this authority. That explains why the courts have spoken of an "inherent power." However, this language must be understood to have force no further than the necessity of the case requires, that is to say, only to the particular government of the court and not to governments in general.

As to governments in general, it is apparent that the inherent-power concept rests on the assumed assertion that they absolutely must have the power to appropriate. It is far from certain that eminent domain power is "inherent" in the sense governments would perish if they did not have it. Natural persons and corporate bodies conduct all sorts of activities with great success without any such power. Take even so imperative a government activity as waging war. Suppose land could not be condemned for fortifications. This would make the conduct of war more difficult than it now is, but the nation would not be defenseless. Land for fortifications could usually be acquired, though perhaps not always exactly where desired and, no doubt, at a higher average cost than if it could be expropriated. Perhaps we could even agree with Pufendorf that eminent domain is "one of the lesser functions of supreme sovereignty."[26]

It is probably true now that American governments have the power to condemn any property rights to aid in accomplishing any permis-

24. H. GROTIUS, DE JURE BELLI AC PACIS 807 (F. Kelsey transl. 1925). This work was originally published in 1625.
25. C. VAN BYNKERSHOEK, *supra* note 22, at 218.
26. S. PUFENDORF, *supra* note 21, at 1285.



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sible governmental enterprise.[27] This, of course, is by force of judicial decisions declaring them to have the power to that extent. It is further true that English, as well as American colonial, state, and federal, governments have followed the practice of expropriating land for certain purposes for several centuries. Going back to about the beginning of the sixteenth century, many, many English and colonial statutes authorized condemnation of land and building materials, either for specific projects or generally, for: roads,[28] bridges,[29] fortifications,[30]

27. *See* Berman v. Parker, 348 U.S. 26 (1954).

28. Connecticut general highway act, undated, but enacted before 1715, contained in ACTS AND LAWS OF CONNECTICUT 50-51. (T. Green printer 1715), and in ACTS AND LAWS OF HIS MAJESTY'S ENGLISH COLONY OF CONNECTICUT 85 (T. Green printer 1750); Delaware general highway act of 1752, contained in LAWS OF THE GOVERNMENT OF NEW-CASTLE, KENT AND SUSSEX UPON DELAWARE 334 (B. Franklin & D. Hall printers 1752); Georgia general highway act of 6 March 1766, contained in GEORGIA COLONIAL LAWS, 17th FEBRUARY 1755—10th MAY 1770 (I. McCloud ed. 1932); Massachusetts general highway act, Ch. 10, L. 1693, contained in ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF THE MASSACHUSETTS—BAY 47 (B. Green printer 1726); Massachusetts general highway act, Ch. 7, L. 1712, *id.* at 227; Massachusetts act regulating buildings and roads in Boston, Ch. 1, L. 1692, *id.* at 1; New Hampshire general highway act of 1719, contained in ACTS AND LAWS PASSED BY THE GENERAL COURT OR ASSEMBLY OF HIS MAJESTIES PROVINCE OF NEW-HAMPSHIRE 149 (B. Green printer 1726); North Carolina general highway act, Ch. 3, L. 1764, contained in ACTS OF ASSEMBLY OF THE PROVINCE OF NORTH-CAROLINA 310 (J. Davis printer 1773); Virginia general highway act, Act 50, of 1732, contained in 1 HENING, VIRGINIA STATUTES AT LARGE 199 (1823); Stat. 13 & 14 Car. 2, c. 6 (1662) (general statute for enlarging and repairing highways); Stat. 8 & 9 Wm. 3, c. 16 (1697) (general statute for widening highways); Stat. 6 Ann., c. 42, §§ 6, 7 (1707) (act for enlarging and repairing highways around the city of Bath); Stat. 10 Ann., c. 16, §§ 4, 5, 6 (1711) (act for enlarging and repairing a road in county of Kent). The above is not an exhaustive list of English statutes, but it is a complete listing of all colonial statutes available to the writer in which expropriation was clearly authorized.

It is virtually certain that land was condemned for roads in the American colonies not mentioned above and that it was condemned before the dates of the statutes cited. A 1639 Massachusetts Bay act, the original of which is not available to the writer, authorized the taking of land for highways, apparently by a procedure similar to that of later Massachusetts statutes. *See* Backus v. Lebanon, 11 N.H. 19 (1840), and W. LOYD, EARLY COURTS OF PENNSYLVANIA 246-47 (1910). In Maine, there are several interesting records of early condemnation procedures in local trial courts, reported in PROVINCE AND COURT RECORDS OF MAINE (C. Libby ed. 1931). The record is given of such a case between Godfry Shelden and the Towne of Scarborough in the County Court at York on 6 July 1669, and of an order by the same court, appointing a committee to lay out a road, in which it appears land could be condemned upon compensation. 2 *id.* at 177, 220. *See also* 4 *id.* at 95, 318 & 376-77.

In Maryland 1704 and 1724 statutes established procedures for laying out roads and repairing bridges. COMPLEAT COLLECTION OF THE LAWS OF MARYLAND 26, 264 (W. Parks printer 1727). The only specific mention of condemnation was for bridge timbers, but it seems likely that land must have been taken also. New Jersey had skimpy road statutes that simply required towns and counties to appoint surveyors to lay out highways. Ch. 20, Acts of 1675, and ch. 1, Acts of 1682, contained in GRANTS, CONCESSIONS AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW-JERSEY [AND] THE ACTS PASSED DURING THE PROPRIETARY GOVERNMENTS 102, 257-58 (A. Leaming and J. Spicer eds.) (pub. shortly after 1750). This volume covers New Jersey

river improvements, [31] and for the great fen drainage projects that were carried out in seventeenth and eighteenth century England.[32]

When we say, as we just have, that English and American "governments" have expropriated land for this purpose and that, we have not been precise enough. We must make a distinction between the legislative and executive branches—between king and Parliament. This leads first to an examination of that English historical institution, the king's prerogatives, which were powers the crown exercised in its own right, without the need of parliamentary authority.

Among the King's prerogative powers were dominion of the sea, control over navigation, foreign affairs, defense of the realm, enforcing acts of Parliament, dispensing justice, coining money, providing for his own household, granting offices and titles of nobility, and collecting taxes.[33] These ancient powers appear to have come down from a time before parliamentary supremacy was established; indeed,

acts during the proprietary period. Later statutes, for the period 1702-1776, are in ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW-JERSEY (S. Allinson ed. 1776). Pages 386-403 of this work contain a lengthy general highway statute of 11 March 1774 that repeals all former road acts, but which says nothing on compulsory taking or compensation. However, it appears that land was expropriated for roads in New Jersey and compensation awarded as early as 1681. *See* Scudder v. Trenton Delaware Falls Co., 1 N.J. Eq. 694, 708-09, 722-26 (1832).

29. For the American colonies, see the highway statutes cited in the preceding note, most of which also dealt with bridges. Many English acts authorizing expropriation of land for bridges are listed in the indexes to the Statutes of the Realm and Statutes at Large. *See, e.g.*, Stat. 14 Geo. 2, c. 33, § 1 (1741) (general bridge act); Stat. 12 Geo. 1, c. 36 (1725) (Thames bridge at Westminster); Stat. 1 Geo. 2, c. 18 (1728) (Westminster bridge); Stat. 9 Geo. 2, c. 29 (1736) (Westminster bridge); Stat. 12 Geo. 2, c. 33 (1739) (Westminster bridge); Stat. 13 Geo. 2, c. 16 (1740) (Westminster bridge); Stat. 23 Geo. 2, c. 37 (1750) (Thames bridge at Hampton Court).

30. *See, e.g.*, Stat. 4 Hen. 8, c. 1 (1512) ("Bulwerkes Brayes Walles Diches and al other fortificacions" from "Plymmouth" to "Landes ende," Cornwall); Stat. 7 Ann, c. 26 (1708); Stat. 31 Geo. 2, c. 39 (1758); Stat. 32 Geo. 2, c. 30 (1759); Stat. 33 Geo. 2, c. 11 (1760).

31. *See, e.g.*, Stat. 6 Hen. 8, c. 17 (1514-1515); Stat. 31 Hen. 8, c. 4 (1539); Stat. 7 Jac. 1, c. 19 (1609).

32. *See, e.g.*, Stat. 15 Car. 2, c. 17 (1663) (Bedford Level); Stat. 16 & 17 Car. 2, c. 11 (1664-1665) (Deeping Fen); Stat. 21 Geo. 2, c. 18 (1748) (Isle of Ely); Stat. 2 Geo. 3, c. 32 (1761) (Fens in Lincoln County). An earlier act, Stat. 43 Eliz., c. 11 (1601), calling for fen drainage in the Isle of Ely and in Cambridge, Huntingdon, Northampton, Lincoln, Norfolk, Suffolk, Sussex, Essex, Kent, and Durham counties, made land available for the project by an interesting technique that might be termed "semi-expropriation." The fee owners, together with a *majority* of the holders of rights in common, were authorized to contract with persons for draining the soil. This is the same technique that was later used in the enclosure acts. *See, e.g.*, Stat. 29 Geo. 2, c. 36 (1756), as amended by Stat. 31 Geo. 2, c. 41 (1758).

33. A more detailed and complete list is in 6 COMYN'S DIGEST OF THE LAWS OF ENGLAND. 28-76 (4th ed. 1800).

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they seem hardly capable of growth by, say, the sixteenth or seventeenth century.[34] Implied in the powers enumerated were further powers "necessary and proper" (as American constitutional lawyers would say) to accomplish the principal objects. Under some of these further powers, the king or his ministers might make use of private land and to some extent even destroy the substance of it, all without compensation. For instance, the king might, it was finally decided in 1606, dig in private land for saltpeter to make gunpowder for defense of the realm.[35] Or he might, through his commissioners of sewers, rebuild and repair ancient drains, ditches, and streams for draining the land to the sea.[36] This came from his power to guard against the sea and to regulate navigation. From the same power, he might build and repair lighthouses, build dikes, and grant port franchises.[37] To carry out his prerogative to coin money, he had power to work all gold and silver mines.[38] Fortifications could be built without compensation on private land, these being, of course, for defense of the realm.[39] Also without compensating, the king's officers could raze private buildings to protect his subjects against a conflagration.[40] While the other prerogatives have been merged into our modern doctrine of eminent domain, this power to raze remains yet, not precisely as an exception to eminent domain theory, but as survivor of an older institution.

Most of the prerogative acts were done without compensation. However, with purveyances of supplies for the royal household, when they could be made without the owner's consent, the ancient and universal practice seems to have been to require payment of full value. Magna Charta allowed the king to take corn and other provisions without consent for immediate cash payment.[41] When, in 1661, a statute allowed the king to have compulsory use of horses, oxen, and carriages for his travels, it was at a rate per mile set out in the statute.[42] Similarly, the

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34. *See* Case of the King's Prerogative in Saltpetre, 12 Coke. 12, 77 Eng. Rep. 1294 (1606).
35. *Id.*
36. Case of the Isle of Ely, 10 Coke. 141, 77 Eng. Rep. 1139 (1610).
37. 5 Bacon's Abridgment *Prerogative*, 498, 503-04, 510 (5th ed. 1798).
38. *Id.* at 516.
39. *See* Case of the King's Prerogative in Saltpetre, 12 Coke. 12, 77 Eng. Rep. 1294 (1606).
40. *Id.*
41. Magna Charta, Ch. 28 (1215).
42. Stat. 13 Car. 2, c. 8 (1661).

1662 statute that authorized compulsory land or water transportation for the army and navy required payment, either at rates fixed in the statute or by arbitration.[43] Other purveyance acts, which allowed acquisition of supplies only with the owner's consent, probably meant in practice that the owner would often sell at a bargained-for price. Some of the purveyance acts, then, did recognize the compensation principle that we associate with eminent domain. To this extent there may be some borrowing historically between prerogative and eminent domain theory.

One thing the king could never do under his prerogative powers was to take a possessory estate in land. We know he might have interests like profits and easements, but a distinction was apparently always made between these interests and estates. Possibly a theoretical explanation would be that the king, as chief lord and grantor, could not derogate from his own grant. By Magna Charta, Chapter 31, the king and his officers are forbidden to take timber without consent. Commenting on this, Lord Coke makes the revealing observation that it was thus because timber was "parcell of the inheritance," which the king could take "no more then the inheritance it selfe."[44] In *Case of the Isle of Ely*,[45] Coke and the other justices held that sewer commissioners could not be given power by the king to take land for new drainage works, though Parliament might have conferred such power. Consistent with this is Blackstone's assertion that only the legislature may condemn land.[46]

Prerogative power and eminent domain, though similar in some ways, were essentially different. Prerogative belonged to the king, eminent domain, to the legislative branch. Prerogative could not be used to acquire estates in land and only under heavy restrictions to acquire personalty, while eminent domain power exists for those purposes. Compensation is always associated with eminent domain, but with prerogative, only for certain kinds of purveyances and then by force of statute. It seems true that some of the prerogative powers have now been comprehended within eminent domain, to the extent prerogative was used to acquire personalty or to diminish property

43. Stat. 13 & 14 Car. 2, c. 20 (1662).
44. E. COKE, SECOND INSTITUTE *34-35.
45. 10 Coke. 141, 77 Eng. Rep. 1139 (1610).
46. 1 W. BLACKSTONE, COMMENTARIES *139.



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48. Case of the Isle of Ely,
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interests in land. A remnant from prerogative is the power to destroy buildings without compensation to stop the spread of a conflagration. Only in a limited sense, then, is it proper to think of eminent domain and prerogative as being the same institution even today. It is not at all correct to say eminent domain grew out of prerogative.

Therefore, we cannot pinpoint the origins of eminent domain in English law until we find two things: (1) an act of Parliament that (2) authorized a compulsory taking of an estate in land. The first definite evidence of expropriation of land and, therefore, of eminent domain, is found in the earliest of the several statutes of sewers, enacted in 1427.[47] Reciting that ancient ditches, gutters, walls, bridges, and causeways for draining lowlands in Lincoln County had fallen into disrepair, the statute appointed commissioners of sewers to maintain them, with power to assess benefitted landowners. Evidence of power to take land is fleeting: "where shall need of new to make." There is no indication of condemnation procedure, nor of a compensation requirement. Coke, however, says the taking of land for new works was authorized under this act and under the several renewals of it.[48] A most interesting statute of 1512 definitely allowed land on the Cornish coast to be taken, or at least occupied, for fortifications and, in express language, without compensation.[49] Why without compensation? Obviously because the act was in aid of the king's prerogative to build

47. Stat. 6 Hen. 6, c. 5 (1427). The earliest statute found that even remotely contains elements of eminent domain was the Statute of Winchester of 1285, which required landowners to cut down underbrush along roads so that robbers might not hide. Stat. Winchester, 13 Edw. 1, Stat. 2, c. 5 (1285). Obviously this was not an exercise of eminent domain but of what we would call the police power, as were some other statutes of the Middle Ages that required riparian owners to remove such obstructions as "gorces, mills, wears, stanks, stakes and kiddles" from navigable streams. Stat. of Cloths, 25 Edw. 3, Stat. 4, c. 4 (1350). *See also* Stat. 1 Hen. 5, c. 2 (1413); Stat. 4 Hen. 6, c. 5 (1425); Stat. 9 Hen. 6, c. 9 (1430). To their contemporaries, the Statute of Winchester and the navigable-stream acts would likely have been understood as passed in aid of the king's prerogative powers.

Another practice that falls short of eminent domain is the old English system, also very much a part of American history, of requiring landowners to contribute labor and materials to the repair of roads. *See, e.g.*, Stat. for Mending of Highways, 2 & 3 Phil. & M., c. 8 (1555); Stat. 5 Eliz., c. 13 (1562); Stat. 18 Eliz., c. 10 (1576); Stat. 29 Eliz., c. 5, § 2 (1587); Stat. 3 & 4 W. & M., c. 12, §§ 5, 6, 7 (1691); Stat. 1 Geo. 1, Stat. 2, c. 52 (1715); Stat. 7 Geo. 2, c. 9 (1734). For American colonial statutes, see those cited in note 28, *supra*.

48. Case of the Isle of Ely, 10 Coke. 141, 77 Eng. Rep. 1139 (1610). The original statute was for ten years. It was continued from time to time by Stat. 18 Hen. 6, c. 10 (1439); Stat. 23 Hen. 6, c. 8 (1444-45); Stat. 12 Edw. 4, c. 6 (1472); Stat. 4 Hen. 7, c. 1 (1488-89); and Stat. 6 Hen. 8, c. 10 (1514-15).

49. Stat. 4 Hen. 8, c. 1 (1512).

fortifications, as the statutes of sewers were in aid of his prerogative to drain land into the sea. Perhaps it is significant also that it was thought necessary explicitly to deny compensation, hinting that someone in 1512 might otherwise have expected it. At all events, by 1514 and again in 1539 we have clear examples of eminent domain with compensation in a form we would recognize today. The 1514 statute authorized the city of Canterbury to improve a river, but provided that anyone whose mill, bridge, or dam was removed should be "resonably satysfyed."[50] In 1539 the statute granted power to the mayor and baliffs of Exeter to clear the River Exe, providing that "they shall pay to the owners and farmers of so much ground as they shall dig, the rate of twenty years purchase, or so much as shall be adjudged by the justices of assise in the county of *Devon*."[51] It is interesting to note that the cities of Canterbury and Exeter were authorized by Parliament to perform works the king might have done under his prerogative powers. Not only does this indicate the king's power was not exclusive, but it suggests that, while the king might have acted without paying compensation, Parliament would not. After this period of time, Parliament exercised its power of eminent domain regularly and often, as we have already observed.[52]

We have made progress. We have established that eminent domain arose in Anglo-American jurisprudence as a function of Parliament. The legislative function has been distinguished from the kingly prerogative power. And finally we have demonstrated how and when eminent domain arose as a parliamentary institution. It is time to return to the basic problem of this section, which is to examine the nature of the power involved in the act of taking by eminent domain. This we do by posing the question, why is eminent domain an exclusive function of the legislative branch?

The answer is tied in with the Anglo-American concept of representative government. John Locke gets to the heart of the matter in his *Essay on Civil Government*:[53]

> *Thirdly*, The *Supream Power cannot take* from any Man any part of his *Property* without his own consent. For the preservation of Prop-

50. Stat. 6 Hen. 8, c. 17 (1514-1515).
51. Stat. 31 Hen. 8, c. 4 (1539).
52. *See* notes 28-32, *supra*.
53. J. Locke, *An Essay Concerning Civil Government*, in LOCKE'S TWO TREATISES OF GOVERNMENT 378-80 (P. Laslett ed. 1960).



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We have established that eminent domain
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question, why is eminent domain an exclu-
ive branch?

With the Anglo-American concept of repre-
n Locke gets to the heart of the matter in
*nent*:[53]

> *wer cannot take* from any Man any part of
> own consent. For the preservation of Prop-
> erty being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should *have Property*. . . . 'Tis true, Governments cannot be supported without great Charge, and 'tis fit every one who enjoys his share of the Protection, should pay out of his Estate his proportion for the maintenance of it. But still it must be with his own Consent, *i.e.* the Consent of the Majority, giving it either by themselves, or their Representatives chosen by them.

Of course Locke was speaking of taxation as well as of expropriation. He is uttering the classic cry, "no taxation without representation." But his statement was understood by the American colonists to apply as well to eminent domain. Article 10 of the Massachusetts Declaration of Rights, adopted in 1780 and the prototype for several other original state constitutions, manifestly shows its Lockeian source:[54]

> Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share of the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people . . . and whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive reasonable compensation therefor.

The final sentence, requiring compensation, will be dealt with in the next section; it did not come from Locke and is quoted here only for completeness. Interestingly, this final sentence was not in the drafting committee's draft, but was added on the floor of the Massachusetts constitutional convention.[55] So, the principle that first came to mind, even before the compensation requirement, was that property could be taken only by consent—of the individual in person or by his representatives consenting for him. Several other of the early state constitutions, adopted during or shortly after the Revolutionary War, con-

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*cerning Civil Government*, in LOCKE'S TWO TREATISES
ett ed. 1960).

54. 3 F. THORPE, FEDERAL AND STATE CONSTITUTIONS 1891 (1909).
55. *See* Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay 38, 191-94, 225 (1832).

tained equivalent language about consent.[56] In point of time, the constitutions of the thirteen original states as a rule contained the consent language earlier than, in later constitutions, they did provisions for compensation.[57]

Now we may answer the question previously posed: why is eminent domain an exclusive function of the legislative branch? The answer contains the following elements: (1) The sovereign has no power to expropriate property, including tax money, from an individual; (2) Of course the individual may always consent to give away his property or money to the sovereign or, for that matter, to anyone having capacity to receive it; (3) The essence of representative government is that the citizen delegates to his legislative representatives a power to speak and act for him; and (4) By force of this delegated power, the body of legislators may consent in the citizen's behalf that his property or money shall be given up. To be sure, some limitations have been engrafted onto the exercise of this power; these will be discussed presently. But the pure power is a power to consent, not to take against the will.

How realistic is this? It must be granted that the consent theory is not the traditional inherent-power doctrine. And of course it can exist only in a political society, such as ours, that has evolved a mature concept of representative government. How far it is thought to exist in

56. DEL. CONST. art. I, § 7 (1792); N.H. CONST. part I, art. XII (1784); PA. CONST., Declaration of Rights, art. VIII (1776); VA. CONST., Bill of Rights, § 6 (1776). *See* F. THORPE, *supra* note 54.

57. The following original state constitutions contained nothing on the taking of property: DEL. CONST. (1776); GA. CONST. (1777); N.H. CONST. (1776); N.J. CONST. (1776); S.C. CONST. (1776). The following original constitutions contained language, said to be a principle of Magna Charta, to the effect that men should not be deprived of life, liberty, or property without the consent of their peers or the law of the land: MD. CONST., Declaration of Rights, art. XXI (1776); N.Y. CONST. art. XIII (1777); N.C. CONST., Declaration of Rights, art. XII (1776). New Hampshire's second constitution contained both the consent and judgment-of-peers formulas, but no compensation requirement. N.H. CONST. part I, art. XII and part I, art. XV (1784). South Carolina's second constitution contained only the judgment-of-peers statement. S.C. CONST. art. XLI (1778). Connecticut had no constitution until 1818; Maine, none until 1819; and Rhode Island, none until 1842. *See*, respectively, 1 F. THORPE, *supra* note 54, at 536 (1909); 3 *id.* at 1646; 6 *id.* at 3222.

A compensation requirement first appeared in Vermont's abortive constitution of 1777, which, after being framed by a convention and affirmed by the legislature, was never ratified by the people. VT. CONST. ch. I, art. II (1777). This requirement was included in the next Vermont constitution, which was ratified. VT. CONST. ch. I, art. II (1786). Meantime, the original Massachusetts constitution was ratified with a compensation requirement. MASS. CONST. part I, art. X (1780). Next, Pennsylvania's second constitution, of 1790, and Delaware's second constitution, of 1792, picked up this requirement. PA. CONST. art. IX, § 10 (1790); DEL. CONST. art. I, § 7 (1792). Other states gradually added compensation language, generally during the 19th century.

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practice in such a society depends upon how much one believes in the reality of legislative representation. An exception must exist for persons who have property subject to eminent domain and who for some reason have no electoral voice in choosing representatives. Another exception might at first blush seem necessary for a citizen of state *A* who owns land in state *B*, but this is not really an exception, for, by coming into state *B* he subjects himself to its laws as an alien.

If one accepts the principle of representative government, there is no compulsory taking, but rather a voluntary relinquishment by delegated consent. A corollary is that there must be legislative authority for every exercise of eminent domain. It will now be understood why, in the beginning of this section, it was said that property could be taken, not against the owner's absolute will, but only over his "immediate, personal protest."

### *B. Eminent Domain Distinguished from other Powers of Government*

There is a great deal of artificiality in attempting to pigeonhole the types of sovereign power into police power, war power, navigation power, taxing power, eminent domain power, and the like. For one thing, one never knows what to do with such activities as schools, roads, post offices, and water departments. These are swept into the amorphous category of general welfare power, which sounds like a filing system in which everything goes into the "miscellaneous" file. Then there is the interfacial problem of, for example, where does taxation end and eminent domain begin? Furthermore, since the purpose here is to distinguish the eminent domain power, if we were to do that by reference to other powers, we should have to define at least some of them also. This suggests it would be better simply to identify those phenomena which must coincide before we can say government has engaged in an act of eminent domain.

First, eminent domain must be pursuant to parliamentary authority. Second, Parliament's power was to acquire for the use of government private property, originally an estate in land. The private owner gives up, and government acquires, a property interest. A more detailed examination of "property" as it exists in eminent domain will be made later. For the moment the term may be taken to mean a private property interest that can be identified as such within the private owner's

totality of interests and capable of being transferred by him. Eminent domain involves a transfer, or its equivalent, of such an interest to the government.

In the usual case, in which the government acquires the fee in land there is no difficulty in seeing the transfer at work. This is more difficult in some unusual situations, but will still be found to occur upon precise analysis. For example, in *United States v. Welch*[58] the Government took *A*'s land, across which neighbor *B* had an easement appurtenant. The Government's use of *A*'s land prevented *B* from using his easement. In effect, the easement had been extinguished; that is, the easement rights were transferred from the dominant tenement and merged back into the servient tenement from which they had originally come, just as *B* might have released his easement to *A*. Similarly, in *Pumpelly v. Green Bay Co.*,[59] where a corporation having eminent domain power flooded land, in effect they acquired a well known interest in land, a flowage easement. Again, where a governmental entity blocks the street access enjoyed by an abutting owner, in substance government has received the release of the interest known as an easement of access that formerly burdened the street. In all these examples government's quantum of property rights have been augmented and the condemnee's rights diminished.

This description of the act of taking forces some line drawing between eminent domain and two other categories of government powers. First is the so-called police or regulatory power. The distinction here ought to be whether government has acquired unto itself a property right—an interest that is literally or effectively transferred and increases government's store of proprietary interests. The police or regulatory power passes no such interest to the government. It may (and here is where confusion begins) decrease some private owners' property interests and may, in equal measure, increase other private owners' interests. For instance, a zoning regulation that prevents you from building over thirty-five feet high may impose upon you something very like an easement of light, air, and view, burdening your land and benefitting your neighbor's.[60] It is not done, however, under

58. 217 U.S. 333 (1910).
59. 80 U.S. (13 Wall.) 166 (1871).
60. Incidentally, however much we protest that government may not compel one private owner to transfer property interests to another private person, by this and many similar regulatory measures we really do so. We say that we are "adjusting

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the eminent domain power, because, assuming a transfer of some sort does occur, it is not to the government in its ownership capacity.

None of this precludes the possibility that a governmental act in the superficial form of police power might actually be an exercise of eminent domain instead of, or in addition to, police power. For instance, an ordinance forbidding landowners to enter an abutting street would, presumably, be both a regulatory traffic measure and an extinguishment (forced release) of the owners' easements of access upon the city's street. Clearly also, nothing said above implies that all police power measures are constitutional, but only that they are not objectionable as uncompensated exercises of eminent domain. A zoning ordinance, while it should not be struck down as a taking, certainly may be invalid on other grounds, such as that it denies due process or is a denial of equal protection of law.

The second category of similar government power is that of taxation. It is not merely similar to eminent domain; it is the same, as far as the power itself goes. Locke treated eminent domain and taxation interchangeably, as we have seen, requiring a legislative act to exercise either power.[61] Why not say that a taking of money is the same as a taking of property? Indeed, is not money property, as the United States Supreme Court held in 1969?[62]

Traditionally, writers on eminent domain have been scrupulous to find distinctions between that power and taxation. Possibly they have been overmuch concerned with preserving neat and logical distinctions between the labels. More likely the concern has been that labeling taxation as eminent domain would inevitably require compensation exactly equal to the amount of tax. That supposed impasse, however, flows from an imperfect understanding of the compensation requirement, to be discussed as the next item in this article. Anticipating that discussion, it can be said that a tax exaction would have to be returned under eminent domain theory only to the extent it exceeded the taxpayer's fair share of the cost of his government. The corollary also is true, that the government would not have to compensate for the taking of property interests in land or chattels if

conflicts" among citizens, and we hope we are, but we are in many exercises of the police power also compelling a certain amount of transfer or redistribution of property rights.

61. *See* note 53 and accompanying text, *supra*.

62. Sniadach v. Family Finance Corp., 395 U.S. 337, 340 (1969).

the levy fell fairly on a particular owner along with the general citizenry. What would be the difference between, say, a money tax at the rate of $1,000 per section of land and an in-kind exaction at the rate of one acre per section? The distinction between what we call taxation and what is called eminent domain lies, not in any differences between money and things, but between even and uneven exaction. With both taxation and eminent domain, the same basic power is being exercised; it is merely exercised in different ways.

## II. THE COMPENSATION REQUIREMENT

Any sampling of eminent domain cases would certainly show that "compensation" is the issue in the vast majority, either the question whether it should be given or how much. From this point of view, the compensation requirement must be said to be central. But from what has previously been said here about the nature of the legislative power to expropriate, compensation would appear less fundamental. If the power to take is, in our representative system of government, really a power delegated to one's representatives to consent to a transfer of property rights, it could be argued that the legislature could consent on whatever terms it chose. Since the owner might make a gift, the legislature might also transfer gratis or for any price. Though this seems correct in theory, we must hasten to acknowledge that any such possibility is foreclosed in America by constitutional requirements for just compensation. What we see operating here is, therefore, a limitation or additional requirement superimposed upon the pure concept of eminent domain.

We have previously seen that American courts have come to regard compensation as a fundamental principle even in the absence of an express constitutional requirement. This is the situation in North Carolina today, and the United States Supreme Court has read a compensation requirement into the due process clause of the fourteenth amendment.[63] As American courts were forging their eminent domain doctrine in the early to middle, and even into the latter, part of the nineteenth century, they commonly ascribed the requirement to the following sources: Natural law; Grotius and several other

63. *See* notes 11 and 12, *supra*.

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67. 2 J. Kent, Comm...

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civil law jurisprudents; and English precedent, including Magna Charta and the common law. In some instances, as in the renowned 1816 case of *Gardner v. Trustees of Village of Newburgh*,[64] compensation had to be founded in general principles, there being no constitutional requirement. Judges sometimes also spoke of more exotic sources, such as the Bible, Roman law, and the universal practice of all civilized peoples, which we cannot examine for lack of data. However, the three sources first listed can be examined.

J. A. C. Grant has shown convincingly that between, roughly, 1800 and the Civil War, American courts supported the compensation requirement on natural law grounds many times.[65] He is supported by ample numbers of decisions.[66] Chancellor Kent, who also wrote the *Gardner* opinion, insured currency to the natural law rationale by explaining in his *Commentaries* that compensation "is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law."[67] Though it is interesting to know the courts found a natural law basis for compensation, that fact is more the beginning than the end of our present concern.

In the first place, it is no surprise to find early nineteenth century American courts explaining eminent domain compensation in natural law terms. What legal doctrine did they not thus explain? Natural law was the prevailing judicial philosophy. Moreover, the term in itself is almost meaningless; it is an empty vessel into which one can pour

64. 2 Johns. Ch. 162 (N.Y. 1816).

65. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 71-81 (1931).

66. In the following cases the state constitutions did not expressly require compensation at the time, so that the courts can be said to have required it upon natural principles: Vanhorne v. Dorrance, 28 F. Cas. 1012 (No. 16,857) (D. Pa. 1795); Young v. McKenzie, 3 Ga. 31, 44 (1847); Proprietors of Piscataqua Bridge v. New-Hampshire Bridge, 7 N.H. 35 (1834); Sinnickson v. Johnson, 17 N.J.L. 129 (1839); Bradshaw v. Rodgers, 20 Johns. 103 (N.Y. 1822); Gardner v. Trustees of Village of Newburgh, 2 Johns. Ch. 162 (N.Y. 1816). *Vanhorne v. Dorrance* is a real tour de force, containing, not only the most extended and fundamental discussion of eminent domain principles the writer has seen in any American decision, but also a clear statement of the doctrine of judicial review that foreshadowed *Marbury v. Madison*. The following cases contain less important statements of natural-law theory, sometimes in dictum: Bonaparte v. Camden & A.R.R., 3 F. Cas. 821 (No. 1617) (D. N.J. 1830); Cairo & F.R.R. v. Turner, 31 Ark. 494, 499 (1876); Loughbridge v. Harris, 42 Ga. 500, 503 (1871); Henry v. Dubuque & P. R.R., 10 Iowa 540, 543 (1860); Harness v. Chesapeake & O. Canal Co., 1 Md. Ch. 248, 251 (1848); Ash v. Cummings, 50 N.H. 591, 613 (1872); Bristol v. New-Chester, 3 N.H. 524, 534-35 (1826); People v. Platt, 17 Johns. 195, 215 (N.Y. 1819); McMasters v. Commonwealth, 3 Watts 292, 294 (Pa. 1834).

67. 2 J. KENT, COMMENTARIES ON AMERICAN LAW *339.

almost anything. By "natural law," a judge may only be saying "I will it so." To St. Thomas Aquinas, it meant "derived from God," a divine law underlying all human law. To some it means immutable ethical or philosophical principles. To others—and this seems to be what it meant to nineteenth century judges—it means principles that perhaps all civilized peoples, or perhaps the progenitors of Anglo-American law, subscribed to in common. In this sense the theory of natural law rests on nothing more than actual or ascribed notions shared by some sort of consensus of the universe of people referred to; it does not examine any question of rightness or wrongness more ultimate. It assumes that the collective will of this universe is sufficient foundation for law. Blackstone, certainly a natural lawyer, said something very similar when he said the common law is "general customs," of which the judges are "the living oracles."[68] Today we might render it, "The judges are the spokesmen of community consensus."

We are all natural lawyers in the broad sense of the term and always shall be as long as we acknowledge any source of law outside the law. Roscoe Pound's sociological jurisprudence is not so different from Blackstone's jurisprudence of custom. Nor is any of this opposed to the jurisprudence of realism. One can agree fully with Blackstone, or even with St. Thomas, and still subscribe to Holmes' stark, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[69] Holmes is talking about municipal law, the law in force, while Blackstone and St. Thomas are talking about the source of that law. Whether that source is God, custom, or what the judge had for breakfast, when we consider whatever it is, we are natural lawyers. And when we consider the judicial product of the process, we all are positivists. We are simply considering two different stages of the judicial process.

So, it is no great revelation to say early American courts ascribed the compensation requirement to natural law. The more significant question is to examine what "natural law"—what particular source—they had in mind. Other than vague references to the Bible, Rome, and all civilized people, we can identify two sources, the civil law writers and English common law, including Magna Charta. In other words, the term "natural law" was used as shorthand for these two and was not in itself a separate source.

68. 1 BLACKSTONE, COMMENTARIES, *68, 69.
69. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897).





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The usual source of legal doctrine for an early state court having no indigenous controlling rule was an English decision. Not only by force of the reception act we would expect to find in most states, but by the simple necessity of the case, an American court claiming the common law as its birthright had to turn to the English reports. And so, what English cases were cited as authority for the compensation requirement? None. An oversight? No; there were none. As far as exhaustive research shows, there was not a single English, nor, for that matter, any reported American colonial, decision rendered prior to the formation of the Union in which it was held or said that compensation was required for a taking. If, then, our state courts were correct in their oft-repeated assertion that compensation was an English constitutional or common law right, that claim must be supported by historical matter other than reported decisions.

We have already seen that eminent domain is a legislative power, exercised by Parliament and not by the king. The earliest clear instance of this power is found in the various statutes of sewers, the first of which was enacted in 1427.[70] In a strict sense, one could say that eminent domain compensation could not have arisen until that time. However, the compensation principle can be traced further back in connection with what we today would see as an analogous institution, the king's prerogative to make purveyances. Chapter 28 of the 1215 Magna Charta reads, "No constable or other bailiff of ours shall take corn or other provisions from anyone without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller." If, as commonly supposed, Magna Charta was a reassurance of established principles, we might speculate that compensation for purveyances was then already an expected thing. Be that as it may, it is no speculation that compensation became a feature of a number of purveyance statutes through the American colonial period. In many instances the prerogative was destroyed entirely by the statutory requirement that the owner freely consent to the transfer.[71] Other statutes, following the Magna Charta formula, allowed compulsory transfer but required compensation, either at a customary (market value) rate[72] or at a rate fixed by the statute.[73] One suspects that

70. *See* note 47 and accompanying text, *supra*.
71. *See, e.g.*, Stat. Westminster I, 3 Edw. 1, c. 1 (1275); Stat. 14 Edw. 3, St. 1, c. 19 (1340).
72. *See, e.g.*, Stat. 13 & 14 Car. 2, c. 20 (1662).
73. *See, e.g.*, Stat. 13 Car. 2, c. 8 (1661).

even the statutes that outright forbade purveyances contemplated that the king would ordinarily obtain supplies at a price freely bargained for.[74]

Purveyance statutes are in themselves examples of the principle that government must pay for what it takes. It is tempting to infer that medieval Englishmen conceived of this as a general politico-legal principle. That may, however, not be permissible in the absence of other direct evidence. We saw previously that the king's powers were regarded more warily than parliamentary ones, which was why only Parliament had eminent domain power. At a certain stage of history it is not unusual to find what are later systematized as general principles applied only to isolated cases. It may be a truism that, viewed chronologically, what begins as the exception ends up as the rule. Still, despite a lack of direct evidence, one may speculate upon some connection between the compensation requirement in eminent domain and a similar earlier principle for purveyances. Possibly compensation was a general principle or perhaps it was only a principle for purveyances that was applied specially by analogy to eminent domain.

Just when compensation became an accepted principle of English law is difficult to pinpoint. We can say, though, that it existed from the beginning of the American colonial period, which is a significant point for our purposes. The main problem is that, so far as research shows, there was virtually no discussion of the question by English writers. It is a subject about which they appear to have had remarkably little intellectual curiosity. There is Blackstone's remark that the legislature, in taking a man's land, always gives him "a full indemnification and equivalent for the injury thereby sustained."[75] Of course this dates from the end of the colonial period.

A more important discussion, dating happily from the beginning of the period, is found in Robert Callis' *Reading Upon the Statute of Sewers*,[76] which was delivered in Gray's Inn in 1622. We may have some faith in what he says, since only a learned barrister of that inn would have been invited to give readings. In the part in question, Callis was discussing whether the Statute of Sewers then in force empowered sewer commissioners to build new ditches and drains or

74. This suspicion is heightened by those statutes that said a purveyance could be made only by consent and at an agreed price. *See, e.g.*, Stat. 36 Edw. 3, St. 1, c. 6 (1362); Stat. 2 & 3 Edw. 6, c. 3 (1548).
75. 1 BLACKSTONE, COMMENTARIES *139.
76. R. CALLIS, READING UPON THE STATUTE OF SEWERS (1685).

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only to repair existing ones. The original statute, enacted in 1427 as 6 Henry 6, chapter 5, had given them this power, but it had been replaced by a later act in the reign of Henry VIII that was not clear on the point.[77] In fact, shortly before Callis gave his reading, Lord Coke's court had held in the *Case of the Isle of Ely*[78] that the later statute conferred no such power. The Privy Council had then nullified that decision by an opinion that new works were authorized. Callis concurred with the Privy Council and then added:[79]

> That where any man's particular interest and inheritance is prejudiced for the Commonwealths cause, by any such new erected works, That that part of the Countrey be ordered to recompence the same which have good thereby, according as is wisely and discreetly ordered by two several Statutes, . . . *27 Eliz. Chap. 22* [1585] . . . And the other *3 Jac. Reg. c. 14* [1605] . . . [which] may serve as good Rules to direct our Commissioners [of sewers] to imitate upon like occasion happening.

Callis implies that compensation was a general principle, though his proofs are neither ancient nor strong. The statute of 27 Elizabeth is in point, since it authorized the city of Chichester to dig a canal and required compensation. But the statute of 3 James was miscited; it gave the commissioners of sewers control over certain tributaries of the Thames and said nothing of takings or compensation. He might have cited other better and slightly older statutes, as we will see. The real significance of his statement is that he, as a fair representative of his contemporaries, thought compensation required in principle in 1622.

Just how long before that time the principle was recognized is not so sure. Since the 1427 original Statute of Sewers, mentioned above, was the first clear exercise of eminent domain we have been able to document,[80] we cannot expect to find compensation earlier. The 1427 act, while it authorized the sewer commissioners to build new works, said nothing about compensation or about procedures to acquire land. It is not until the early sixteenth century that we find examples of a statutory compensation provision.

77. Stat. 23 Hen. 8, c. 5 (1531).
78. 10 Coke. 141, 77 Eng. Rep. 1139 (1610).
79. R. CALLIS, *supra* note 76, at 104.
80. *See* note 47 and accompanying text, *supra*.

One enticing theory, which might be made out, is that the requirement came to be accepted sometime around the turn of the century after a period of doubt. We have previously mentioned the 1512 act that ordered fortifications on the Cornish coast, land therefor to be used expressly without compensation.[81] Then, two or three years after, we find a statute authorizing the city of Canterbury to improve a river channel, requiring compensation for destruction of mills and dams.[82] Later sixteenth century statutes similarly required cities or counties to pay for land invaded in making river improvements Parliament authorized.[83] From these bits of evidence it might be supposed that the compensation requirement emerged as an accepted principle around the time of the 1512 statute. However, the matter is clouded by the fact that that statute was for constructing fortifications. The king had a prerogative power to erect fortifications on private land without compensation, on the theory he had a kind of servitude for the purpose.[84] Our statute may well have been viewed by its enactors as being in aid of the king's power. So, for that matter, might the Statute of Sewers have been viewed, in a somewhat different way, for the king had prerogative power to, and did, appoint sewer commissioners. In fact, Coke believed the purpose of the 1427 Statute of Sewers was to enlarge the powers of commissioners previously appointed by the king, to allow them to take the freehold for new works, which, Coke said, only Parliament could authorize.[85]

Thus viewed, an essential difference appears between the Cornwall fortification statute and the later acts conferring power on cities and counties. These political bodies were not exercising the king's power but Parliament's power of eminent domain. Compensation, though required in the latter case, might not be in the former, and the two cases not be contrary. The Statute of Sewers was different yet, because, while it may have been intended to aid the king's commissioners, it gave them powers the king had not, powers of eminent domain. If the compensation principle was recognized in 1427 as it was in the next century, the commissioners would have had to pay for lands for

81. Stat. 4 Hen. 8, c. 1 (1512).
82. Stat. 6 Hen. 8, c. 17 (1514-1515).
83. *See* Stat. 31 Hen. 8, c. 4 (1539); Stat. 27 Eliz., c. 20 (1585); Stat. 27 Eliz., c. 22 (1585). *See also* Stat. 7 Jac. 1, c. 19 (1609).
84. *See* Case of the King's Prerogative in Saltpetre, 12 Coke. 12, 77 Eng. Rep. 1294 (1606); 6 COMYNS'S DIGEST OF THE LAWS OF ENGLAND 28-52 (4th ed. 1800).
85. Case of the Isle of Ely, 10 Coke. 141, 77 Eng. Rep. 1139 (1610).

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new works. What the historical facts were, we do not know. We can safely conclude only that eminent domain compensation was required by Parliament as early as 1514-1515, that it may have been required earlier, but that there is not sufficient evidence on the latter point.

Throughout the seventeenth and eighteenth centuries compensation became a regular feature of English parliamentary acts. We have already cited at length many, many such statutes concerning roads, bridges, fortifications, river improvements, and the draining of the fens.[86] No statute of that era has been found denying compensation for a taking. Until the Lands Clauses Act of 1845, each statute provided for its own compensation scheme, if any; so, one would have to examine every act of Parliament to make an absolutely definitive statement. However, so many statutes dealing with public works have been sampled, a large percentage of those indexed in the Statutes of the Realm and the Statutes at Large, that it is conservative to say Parliament extended compensation as the usual practice during the American colonial era.

In the colonies themselves the granting of compensation was well established and extensively practiced at and before the time of the Revolution. This history has been largely lost to current scholars, who apparently have not looked for it in the right place.[87] The virtual lack of printed colonial appellate decisions denies that usual source for practical purposes. A few post-colonial opinions sketch in their states' colonial eminent domain practices, and these will be mentioned. But the richest source is the highway statutes adopted by colonial legislatures. These, together with a few other records, give a rather definite picture of compensation practices for roads, no doubt the main cause for the taking of land.

Compensation for road lands reportedly was given in Massachusetts Bay under a 1639 law and in New Amsterdam as early as the 1650's, though little detail is available on these practices.[88] We do, however, get an intimate glimpse of compensation at work on the local level from the record of an order entered by the Suffolk County

86. *See* notes 28-32, *supra*.
87. *See, e.g.*, 1 P. NICHOLS, EMINENT DOMAIN 53-58 (Rev. 3d ed. 1964); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).
88. The Massachusetts Bay act, 1 Laws of Mass. Bay Colony 64 (1639). 1 P. NICHOLS, *supra* note 87, at 54, and W. LOYD, EARLY COURTS OF PENNSYLVANIA 246-47 (1910). Loyd also describes the New Amsterdam system at 245-46. The sources relied on are not available to the writer.

(Boston) Court on 27 January 1673/1674.[89] Some landowners in Milton were awarded sums for land taken for a new road, "because [the Law] doth alow Satsfaction [*sic*] for Land in Such Cases if the parties Requier it." Even more revealing are several entries from the same era for the County Court at York, Maine, which was, of course, then a part of Massachusetts politically. The earliest, for 6 July 1669, shows that commissioners were appointed to lay out a road across Godfrey Shelden's land and to fix the compensation to be paid him by the town of Scarborough.[90] As to others whose lands were occupied, the court added, "those whose grounds are Trespased upon are to be satisfyed according to Law." Another order, in 1671, appointing a committee to lay out a road directed that "where any person suffers Inconvenience relateing to his propriety by the Convenience of the Road, It is to bee valewd & fully made good by the Townes within whose limitts it falls, to all reasonable satisfaction."[91] Later, briefer minute entries of 1697/1698, 1705, and 1710 are consistent with the two earlier ones.[92] The suggestion is of a well-defined principle, understood at the working level and going back to the mid-seventeenth century or earlier in Massachusetts.

Then we have highway acts for most of the colonies and can fill in the gaps for some others with cases from statehood days. In the colonies, somewhat differently than in England at the time, the custom was to adopt a general act for the building and repair of highways. The Massachusetts statute of 1693, itself seemingly derived from the 1639 act, followed a scheme that later appeared in several other colonies.[93] Anyone, such as a town, that wanted a new road applied to the county court, which appointed a commission to report on the need. Upon the commissioners' report, if the court found the road needed, a local "jury" was appointed to lay out the route. Compensation was provided for as follows: "*Provided,* That if any Person be thereby damaged in his Propriety or Improved Grounds, the Town shall make him reasonable Satisfaction, by the Estimation of those that Laid out

89. 31 COLONIAL SOCIETY OF MASSACHUSETTS, PUBLICATIONS (RECORDS OF THE SUFFOLK COUNTY COURT 1671-1680) 400-01 (1933).
90. 2 PROVINCE AND COURT RECORDS OF MAINE 177 (C. Libby ed. 1931).
91. 2 *id.* at 220.
92. 4 *id.* at 95; 4 *id.* at 318; 4 *id.* at 376-77.
93. Mass. L. 1693, Ch. 10, found in ACTS AND LAWS, OF HIS MAJESTY'S PROVINCE OF THE MASSACHUSETTS-BAY IN NEW-ENGLAND 47-49 (B. Green printer 1726).





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the same. . . ." An owner aggrieved by the "jury's" estimate could appeal to the county court. Once a road was built, it was maintained by the citizens of the towns through which it ran, who, under the direction of town "surveyors," had to donate labor and materials. This basic scheme of highway establishment and maintenance, with some variation in details, was eventually followed by statute in Connecticut, Delaware, New Hampshire, North Carolina, and partially in Pennsylvania.[94]

Data for the other colonies is more checkered, but everything there is evidences compensation for road lands. The Georgia Supreme Court in 1851 reviewed the matter and said compensation had been awarded for enclosed, though not for unenclosed, land in colonial times.[95] Maryland's statutes seem not to have touched upon the subject, but a 1724 act permitted the cutting of timber for bridges as long as it was not suitable for "Clapboards or Coopers Timber."[96] In New Jersey apparently land for local roads was taken without compensation, on the theory the owners' benefits exceeded losses, while main

94. Conn. act, undated but before 1715, found in ACTS AND LAWS OF HIS MAJESTY'S ENGLISH COLONY OF CONNECTICUT IN NEW ENGLAND IN AMERICA 85-88 (T. Green printer 1750), and in substantially same language in ACTS AND LAWS OF HIS MAJESTY'S COLONY OF CONNECTICUT IN NEW ENGLAND 51 (T. Green printer 1715); Dela. act of 1752, found in LAWS OF THE GOVERNMENT OF NEW-CASTLE, KENT AND SUSSEX UPON DELAWARE 334-41 (B. Franklin & D. Hall printers 1752); N.H. act of 1719, found in ACTS AND LAWS PASSED BY THE GENERAL COURT OR ASSEMBLY OF HIS MAJESTIES PROVINCE OF NEW-HAMPSHIRE IN NEW-ENGLAND 149-51 (B. Green printer 1726); N.C. L. of 1764, ch. 3, found in ACTS OF ASSEMBLY OF THE PROVINCE OF NORTH-CAROLINA 310-13 (J. Davis printer 1773); Pa. L. of 1700, ch. 55, found in ACTS OF ASSEMBLY OF THE PROVINCE OF PENNSYLVANIA 9 (Hall & Sellers printers 1775). As to Pennsylvania, the word "partially" in text refers to the fact that road lands could be taken without compensation because, in its original grants, the proprietary government added an extra six percent of land for future road use. *See* notes 16-17 and accompanying text, *supra*. Therefore, the 1700 statute allowed compensation only for improvements on the land but not for land itself. *See* M'Clenachan v. Curwin, 3 Yeates 362 (Pa. 1802), and Feree v. Meily, 3 Yeates 153 (Pa. 1801). As a matter of general interest, the Pennsylvania statute book cited above, belonging to the law library at the University of Washington, bears on the title page the handwritten name of its original owner, John Dickinson. Another example of his signature will be found subscribed to the United States Constitution.

95. Parham v. Justices, 9 Ga. 341 (1851). The holding is that, while compensation had not previously been required for unenclosed land, it henceforth would be, owing to the increase in its value. Apparently there was no colonial statute on the question, though the writer is unwilling to state this categorically. The only collection of Georgia colonial statutes available, GEORGIA COLONIAL LAWS 1755-1770, 324-34 (I. McCloud ed. 1932), contained a general road act of 1766 that did not deal with compensation.

96. T. BACON, LAWS OF MARYLAND AT LARGE c. 14 § 3 (1765); COMPLEAT COLLECTION OF THE LAWS OF MARYLAND (W. Parks printer 1727). The 1724 bridge act is on page 264 of the latter collection.

highways were paid for, at least after 1765.[97] The compensation situation in Virginia is not very clear, despite the preservation in Hening's Statutes at Large of a number of road acts from 1632 on.[98] There was no general compensation scheme by statute, though bridge timbers and earth fill had to be paid for from around mid-eighteenth century.[99] Apparently the practice was to take unimproved land for roads without compensation.[100] South Carolina's practices, though not statutory, were well known, even notorious. Compensation was given in the few instances in which improved lands were taken, but not for unimproved land.[101] The South Carolina Supreme Court sanctioned this sytem until about 1836,[102] raising both the eyebrows of judges in other states,[103] and the hackles of South Carolina's own dissenting judges.[104]

One feature of colonial compensation wants explaining. Apparently the normal, if not universal, pattern was to pay only for improved or enclosed land.[105] Even in Massachusetts and colonies that had her comparatively thorough statutory scheme, that seems to have been the case. It will be recalled that the Massachusetts statute spoke of satis-

97. Scudder v. Trenton Delaware Falls Co., 1 N.J. Eq. 694, 756 (1832). The court refers to a 1765 statute that allowed compensation for land for main highways, which were thought to benefit all the public and not only adjacent owners. Since the only statutory collection available to the writer was published in 1750, this could not be confirmed. A 1682 road act required counties to build and maintain roads, but gave no details on procedures to be used. N.J. L. of 1682, c. 1, found in GRANTS, CONCESSIONS AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW-JERSEY [AND] THE ACTS PASSED DURING THE PROPRIETARY GOVERNMENTS 257-58 (A. Leaming & J. Spicer eds., pub. shortly after 1750).

98. Some of the road statutes dealt with specific roads only or had to do with repairs. Repairs were made on the usual Anglo-American plan for the day, *i.e.*, work by citizens under the direction of local surveyors. Va. L. 1657-1658, Act 9, in 1 Hening's Stats. 436 (1823); Va. L. 1705, Ch. 39, in 3 Hening's Stats. 392 (1812); Va. L. 1748, Ch. 28, in 6 Hening's Stats. 64-69 (1819). The most interesting statutes having to do with establishing roads were: Va. L. 1632, Act 50, in 1 Hening's Stats. 199 (1823); Va. L. 1705, Ch. 39, *supra;* and Va. L. 1748, Ch. 28, *supra.*

99. Va. L. 1738, Ch. 7, in 5 Hening's Stats. 31-35 (1819); Va. L. 1748, Ch. 28, in 6 Hening's Stats. 64-69 (1819); Va. L. 1762, Ch. 12, in 7 Hening's Stats. 579 (1820).

100. *See* Stokes v. Upper Appomatox Co., 3 Leigh 318, 337-38 (Va. 1831) (Brooke, J.).

101. Lindsay v. Commissioners, 2 Bay 38 (S.C. 1796). *See also* State v. Dawson, 3 Hill 100 (S.C. 1836); Shoolbred v. Corporation of City of Charleston, 2 Bay 63 (S.C. 1796).

102. State v. Dawson, 3 Hill 100 (S.C. 1836); Shoolbred v. Corporation of City of Charleston, 2 Bay 63 (S.C. 1796); Lindsay v. Commissioners, 2 Bay 38 (S.C. 1796).

103. *See* Parham v. Justices, 9 Ga. 341, 348 (1851); Bloodgood v. Mohawk & H.R.R., 28 N.Y. Comm. L. (18 Wend.) 9 (1837).

104. *See especially* State v. Dawson, 3 Hill 100 (S.C. 1836) (Richardson, J., dissenting).

105. Except in Pennsylvania, where, owing to the unusual nature of the proprietary grants, payment was made only for the improvements situated on improved land, but not for the soil itself. *See* note 94, *supra.*



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faction for "Propriety or Improved Grounds." This is not a denial of the compensation principle, or was not so regarded at the time, however we might view it in our day. In a time when unimproved land was generally of little worth, a new road would give more value than it took. The principle is the still-familiar one of offsetting benefits and was so recognized by judges who commented upon it in early state decisions.[106] In effect, the colonials made an "irrebutable presumption"; that is, a rule of law by the fictionalizing process, that a new road would always give more value than the unenclosed land it occupied had. One may feel this a violent assumption, even for land on a wild frontier. Such an objection, however, goes, not to the principle, but only to the facts on which it should be applied. The colonial practice of paying only for unenclosed land did not deny the general right of compensation.

We have now seen that compensation was the regular practice in England and America, as far as we can tell, during the whole colonial period. One must stop short of saying it was invariably practiced, because data to support that kind of statement will never be assembled. However, Blackstone, writing near the end of the colonial experience, and Callis, commenting at the beginning, both regard compensation as an accepted principle. Had there been more contemporary commentators, we might know more surely how they regarded the institution. The indications, though they lack that final degree of conclusiveness, all point to one conclusion: early state courts were justified in their claim that compensation was a principle of the common law—of immemorable usage in our land and in the land of our land.

The English and colonial usage, while it was precedent for the compensation principle, did not touch upon one important dimension of the subject. What is the theoretical justification for compensation? What, in the relationship between citizen and state, requires payment for property interests taken? For the answers to these questions, we have to look initially to the third source of the compensation requirement cited by early American decisions, a group of continental writers on jurisprudence.

The first of these writers in point of time, Hugo Grotius, was little interested in the compensation issue. About all he said was that com-

106. *See especially* Parham v. Justices, 9 Ga. 341 (1851); Scudder v. Trenton Delaware Falls Co., 1 N.J. Eq. 694 (1832); Lindsay v. Commissioners, 2 Bay 38 (S.C. 1796) (arguments of counsel against motion).

pensation was required.[107] Samuel Pufendorf, writing a bit later in 1672, does briefly offer a rationale:[108]

> Natural equity is observed, if, when some contribution must be made to preserve a common thing by such as participate in its benefits, each of them contributes only his own share, and no one bears a greater burden than another. . . . [T]he supreme sovereignty will be able to seize that thing for the necessities of the state, on condition, however, that whatever exceeds the just share of its owners must be refunded them by other citizens.

Emerich de Vattel agrees that "the burdens of the State should be borne equally by all, or in just proportion."[109] The fourth scholar usually associated with the group, Cornelius Van Bynkershoek, seems to be in general agreement. [110]

The theory here is that of just share—that a citizen should be expected to bear no greater cost of government than other citizens. Why is that so? Pufendorf bases the theory on "natural equity," which is shorthand for, "I refuse to seek a more fundamental reason, but rest my case in the belief I have reached a proposition you will accept without demonstration." May we not still ask what would be so bad about government exacting property of greater value from one citizen than from his fellows? This question is really two. The first part asks whether there is a general principle that government should treat subjects equally, as enshrined in the equal protection clause of the fourteenth amendment to the United States Constitution. Assuming there ought to be a general principle of equal treatment, the second question arises: Should this assumed principle be extended to property interests?

The answer begins with John Locke, despite the fact that he did not directly discuss the compensation question. At an earlier point in this article Locke was quoted supporting the proposition that a taking had to be consented to by the owner's legislative representatives.[111] Only reluctantly did Locke concede that government should have the power to compel the surrender of tax money or property. However, he recog-

107. H. GROTIUS, DE JURE BELLI AC PACIS 385, 807 (F. Kelsey transl. 1925).
108. S. PUFENDORF, DE JURE NATURAE ET GENTIUM 1285 (C. and W. Oldfather transls. 1934).
109. E. DE VATTEL, THE LAW OF NATIONS 96 (C. Fenwick transl. 1916).
110. C. VAN BYNKERSHOEK, QUAESTIONUM JURIS PUBLICI 218-23 (T. Frank transl. 1930).
111. *See* note 53 and accompanying text, *supra*.



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nized there was no other way for government to be supported, and so he acknowledged " 'tis fit every one who enjoys his share of the Protection, should pay out of his Estate his proportion for the maintenance of it." The word "proportion" is a reference to Pufendorf's principle of just share. Locke, however, carries the matter back to a more fundamental proposition. He says the "preservation of Property" is "the end of Government, and that for which Men enter into Society." It would, of course, be absurd to form a government having "the" end of preserving property, and then to use that government to take away property.

In essence, Lockeian social contract theory says this: When men were in a simple state of nature, before government was formed, they enjoyed private property and personal liberty unhindered. As natural society became more complex, its members impinged upon each other, so that it became necessary to form governments, the purpose of which were to preserve the private rights enjoyed in the state of nature. Government is a servant, necessary but evil, to which its subjects have surrendered only what they must, and that grudgingly. They recognize that government needs their money and other property to operate, but it would defeat the very purpose if government could extract a larger share from a subject than it needs to serve its purposes to him. Applied to taxation, this means no man should be asked to give more than pays for his share of protection. Eminent domain presents a special problem, for by its nature it falls unevenly upon first this man then that. Compensation evens the score.

Lockeianism certainly is not the only theory of government, not even among philosophers who in general subscribe to the social contract. Hobbes and Rousseau, both subscribers, describe the contract in a way that would obviate the necessity, if not the possibility, of compensation. Hobbes states flatly that, while subjects have property rights against each other, they have none "such, as excludeth the Right of the Soveraign."[112] In Rousseau's paternalistic state, everything belongs to the sovereign, which parcels property rights out to its subjects as it judges their needs.[113]

No claim is here made that Locke is right or wrong in any ultimate

112. T. HOBBES, LEVIATHAN 235-36 (A. Waller ed. 1904).
113. Is this a harsh interpretation of Rousseau? Read Bk. 1, Ch. 9, of his SOCIAL CONTRACT, found in J. ROUSSEAU, THE SOCIAL CONTRACT 65-68 (Penguin Books, M. Cranston transl. 1970).

sense—only that his was the accepted theory of government in America when the American doctrine of eminent domain was being hammered out. The earliest eminent domain clauses, such as Massachusetts', were mostly paraphrased from chapter XI of his *Essay on Civil Government*.[114] Indeed, the very idea of a written, ratified constitution is an embodiment of the social contract.

Professor Joseph L. Sax denies that the purpose of the compensation requirement was protection of private property or, as he puts it, "value maintenance."[115] Speaking especially of Grotius, Vattel, and Pufendorf, he says their concern was not the fact of loss, but the danger that subjects might be tyrannized by ill-considered, hasty, or discriminatory takings. Political freedom, not proprietary protection, is the interest at stake.

There are several problems with this theory. Most obvious, Professor Sax has stated a basis for the so-called public-use limitation instead of for the compensation requirement. Grotius, Vattel, and Pufendorf, as well as Bynkershoek, were very interested in the question of the purposes for which eminent domain could be used. They agreed the power could not be used arbitrarily but carried on a lively discussion about whether it had to be for "public advantage" (Grotius), [116] "public welfare" (Vattel),[117] "necessity of the state" (Pufendorf),[118] or "public utility" (Bynkershoek).[119] The passages upon which Professor Sax relies relate to that discussion. His explanation also ignores the influence of John Locke, nor does he acknowledge the extensive Anglo-American experience with compensation during the colonial period. The ultimate problem with his theory, however, is self-implied. If fear of political oppression is the reason for compensa-

114. *Compare* J. LOCKE, AN ESSAY CONCERNING CIVIL GOVERNMENT 376-80 (P. Laslett ed. 1960), *with the following:* MASS. CONST., Declaration of Rights, art. X (1780) found in 3 F. THORPE, FEDERAL AND STATE CONSTITUTIONS 1891 (1909); DEL. CONST. art. I, Sec. 8 (1792) found in 1 *id.* at 569; N.H. CONST., Part I, art. XII (1784), found in 4 *id.* at 2455; PA. CONST., Declaration of Rights, art. VIII (1776) found in 5 *id.* at 3083; VA. CONST., Bill of Rights, Sec. 6 (1776), found in 7 *id.* at 3813.

115. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 53-54 (1964).

116. H. GROTIUS, *supra* note 107, at 385.

117. E. DE VATTEL, *supra* note 109, at 96.

118. S. PUFENDORF, *supra* note 108, at 1285. Pufendorf explains he does not mean absolute necessity but necessity as a matter of degree, as long as the requirement was not too much relaxed.

119. C. VAN BYNKERSHOEK, *supra* note 110, at 218. Bynkershoek equates his standard of "public utility" with Grotius's standard, which was given in text of the present chapter as "public advantage." The difference may be only in translation.





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tion, by what means might that oppression be accomplished? By the taking of property interests. "Oppression," "tyranny," and like words simply describe a process or phenomenon by which objects the subject dreads are visited upon him by his rulers. He dreads, and would avert, the objects, not the empty process. In this case the dreaded object is loss of property, so that we see Professor Sax is concerned with protection of private property after all.

We return, then, to the principle that compensation is designed to even the score when a given person has been required to give up property rights beyond his just share of the cost of government. This presumably always happens when interests in realty or personalty are transferred to the government for some specific project. What about taxation? At an earlier point the position was taken that the power involved in taxation is the same power as that involved in eminent domain. Locke required a legislative act for both and applied the principle of "just share" to both.[120] What are the implications for, say, a graduated income tax? The first observation one might make is that John Locke must not be resting so easily these days. Beyond that, if the theory of "just share" is to be observed, one would have to justify uneven tax rates by demonstrating that taxpayers paying higher rates receive correspondingly higher levels of benefits from government. This is the argument when it is said the high-bracket taxpayer is protected and benefitted more than the low-bracket citizen by such services as national defense, police forces, schools, roads, and so forth. The extent to which this is objectively so, or, conversely, is mere rationalization is, of course, one of the great public debates of our day. Nevertheless, the argument is still carried on in the form of the Lockeian principle of just share.

When, however, unequal tax rates are justified, as they often are, on the theory that government ought to act as redistributor among different persons or groups in society, this is non-Lockeian. It is Rousseauist. In Rousseau's view, a member of society is entitled to no more than he needs for subsistence. He is trustee of his property for the public, and the state's proper function is to redistribute, to the end that "all have something and none of them has too much."[121] Were

120. *See* notes 53 and 61 and accompanying text, *supra*.
121. J. ROUSSEAU, THE SOCIAL CONTRACT 65-68 (Penguin Books, M. Cranston transl. 1970).

this theory to be applied to eminent domain it would produce a system of taking much different from what we actually follow. For instance, one could justify taking land from an individual for less than full value or even for no compensation if that person were found to possess an unequal amount of material things. So far as is known, the redistributive principle has not been urged for eminent domain takings as it sometimes is for taxation.

If we view eminent domain and taxation as two forms of the same power, a certain inconsistency will be seen to exist at the theoretical level. We still insist upon exact value replacement for property condemned but not always for taxes assessed. It may be that the future will see the redistribution principle applied to eminent domain, though there is no indication this actually is occurring. Until it should occur, we must say that compensation exists to insure that no more of an individual's property rights will be taken from him than represents his just share of the cost of government. That is the purpose and the function of the compensation requirement.

## III. THE PUBLIC-PURPOSE LIMITATION

A private person has the inherent privilege of doing anything he has the natural capacity for, limited by regulations imposed for the protection of others. An artificial person, such as a corporation or government, may do only those acts given it by its human creators. We are fond of saying our state governments are governments of "limited powers," meaning that they may do anything not expressly denied them. This somewhat misplaces the emphasis. In the first place, the state constitution has, subject to the amendment process, permanently withheld certain acts from the government. Then there are an infinite number of acts that might be constitutionally permissible but which the state government, meaning in this instance the legislature, has never chosen to do. Should some state officer attempt to carry out some ultra vires act, we would stay him, branding his attempt as either unconstitutional or unauthorized.

If we view eminent domain as one power among many powers of government, it is clear that it might not be used to further some ultra vires end. So, if the state constitution prohibits the legislature from authorizing a lottery, eminent domain could not be used to acquire land for a state gambling casino. Or, if no legislative body having the





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power to do so has authorized a road from point *A* to point *B*, land for such a road may not be condemned. In such cases as these, then, it seems inevitable, even truistic, to say there is a public-purpose limitation on the exercise of the eminent power.

The more difficult question is whether there is, or ought to be, some more stringent limitation on the use of the power. We saw a few pages ago that the original jurisprudential writers on eminent domain were very interested in that question, perhaps more so than in any other eminent domain aspect.[122]

These writers, however they might disagree on the proper amount of it, did seem to agree that eminent domain should to some extent be more restricted than other governmental powers. For instance, Pufendorf and Bynkershoëk, while they used different terminology, seem to agree that land should not be condemned for a park for the public's pleasure, though the state might in general have the power to operate parks. The civil law jurisprudents' views, being quoted in judicial decisions, apparently influenced nineteenth century courts that devised the so-called public-use doctrine. At least the courts found theoretical justification for a result they wanted to reach.

In its purest, and mostly fabeled, form, the public-use doctrine would allow property interests to be taken only if the subject matter in which they exist, land or things, will be used by the public. Reputedly the doctrine traces back to some language by Senator Tracy in New York's 1837 case of *Bloodgood v. Mohawk & Hudson R.R.*[123] At issue in *Bloodgood* was, first, whether the legislature could delegate eminent domain power to a railroad and, second, if so, whether the railroad had to pay for condemned lands before entry or could pay later as the state did. The court answered the first question "yes," for everyone knows the public uses railroads; so, the public-use doctrine did not bar the delegation. On the second issue, the court held that the "just compensation" requirement was for advance payment, since it would be unjust to permit a possibly insolvent railroad to occupy

122. *See* notes 116-119 and accompanying text, *supra*.

123. 28 N.Y. Comm. L. (18 Wend.) 9, 56-62 (1837); Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 600 (1949). The Yale comment is a principal source of the comments made in the text about the public-use doctrine. One fault with the comment, which does not affect its usefulness for present purposes, is that it assumes the courts took the pure form of the public-use doctrine more seriously than they probably did. It is thus easy to establish the "demise" of a thing that hardly ever existed.

land before paying. Senator Tracy disagreed with the majority on the first point, feeling that "public use" ought rightly to mean possession by a government agency. He even grumbled about the established practice of condemning land for highways, for he could not see, if "public use" meant "public benefit," where the power could be limited. Where, indeed?

Whatever the rhetoric, the practical limitations imposed by the public-use doctrine have been slight. It was most often unlimbered in railroad or mill act cases. A few mill acts were struck down in the nineteenth century as involving non-public uses of eminent domain, but they were generally upheld.[124] After all, mill acts had existed in some of the colonies without much question being raised about them.[125] Perhaps the public-use doctrine still has enough vitality that someone might argue it as an objection to an excess condemnation, but with hardly an expectation of success. Certainly no one would be so gauche as to argue that a public park did not serve a public purpose, at least not since urban renewal has generally been held to be a "public use."[126]

It is the urban renewal cases and especially *Berman v. Parker*[127] that have made clear that "public use" cannot be argued in any literal sense. Not only does *Berman* sanction the taking of land for renewal and resale, but it speaks, not of public use, but public purpose and of that most broadly. One wishes the Court had spelled out its views more fully. However, the concept seems to be built up out of these ideas: eminent domain is no more sacred or profane than other powers of government, it may be used in combination with other powers when this would serve a public purpose, and what is a public purpose is up to the legislature and hardly ever up to the courts. The Supreme Court's decision, while it does not constitutionally prevent state courts from taking a more restricted view of "public use," is normative for the federal courts and, no doubt, highly persuasive on the others. *Berman's* concept of public purpose seems very close to the minimum limitation on eminent domain that our system will allow in strict theory.[128]

124. Loughbridge v. Harris, 42 Ga. 500 (1871) (mill act held invalid); Comment, *supra* note 123, at 600-08.
125. 1 P. NICHOLS, EMINENT DOMAIN 58-60 (rev. 3d ed. 1964).
126. *See, e.g.*, Berman v. Parker, 348 U.S. 26 (1954); New York City Housing Auth. v. Muller, 270 N.Y. 333, 1 N.E.2d 153 (1936); Comment, *supra* note 123, at 607-14.
127. 348 U.S. 26 (1954).
128. *See* text accompanying note 122, *supra*.





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One question nobody has much worried about is what the constitutional draftsmen intended concerning public purpose. This is a bit remarkable, considering that the public-use doctrine supposedly came from the phrase "private property shall not be taken for *public use* without just compensation." Grammatically, of course, "public use" is descriptive and not limiting. The phrase does not read "shall not be taken *except* for public use *and* not without just compensation." Nobody seems to have worried about that either, strangely. Nor does there now seem to be much readily available evidence about what, if anything, the draftsmen thought about "public use."

The words "public use" first appeared constitutionally in 1776 in Pennsylvania and Virginia. Pennsylvania's 1776 Declaration of Rights said: "But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives. . . ."[129] No public-use limitation would, of course, be implied with "taken from him" included in the disjunctive. Virginia's 1776 constitution, however, gives the same difficulty as the fifth amendment's present language: "That . . . all men . . . cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected. . . ."[130] Two other early constitutions agreed essentially with Pennsylvania's phraseology,[131] one with Virginia's.[132] The commonest language respecting property rights was what may be called the Magna Charta or due process formula, which typically said no freeman ought to be "deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land."[133] For present purposes, we mercifully may steer clear of the difficult question whether this was intend-

129. PA. CONST., Declaration of Rights, art. VIII (1776), found in 5 F. THORPE, FEDERAL AND STATE CONSTITUTIONS 3083 (1909).

130. VA. CONST., Bill of Rights, sec. 6 (1776), found in 7 F. THORPE, FEDERAL AND STATE CONSTITUTIONS 3813 (1909).

131. DEL. CONST. art. I, sec. 8 (1792), found in 1 F. THORPE, FEDERAL AND STATE CONSTITUTIONS 569 (1909); N.H. CONST., part I, art. XII, (1784), found in 4 *id.* at 2455.

132. VT. CONST., Ch. I, art. II (1777), found in 6 *id.* at 3740. This constitution was never ratified by the people, but the same eminent-domain clause appeared in the ratified constitution of 1786, Ch. I, art. II, found in 6 *id.* at 3752.

133. DEL. CONST. art. I, sec. 7 (1792), found in 1 F. THORPE, FEDERAL AND STATE CONSTITUTIONS 569 (1909); MD. CONST., Declaration of Rights, art. XXI (1776), found in 3 *id.* at 1688; N.H. CONST., part I, art. XV (1784), found in 4 *id.* at 2455; N.Y. CONST. art. XIII (1777), found in 5 *id.* at 2632; N.C. CONST., Declaration of Rights, art. XII (1776), found in 5 *id.* at 2788; S.C. CONST. art. XLI (1778), found in 6 *id.* at 3257.

ed to cover eminent domain.[134] If it was, the words "deprived of" do not suggest a public-use or public-purpose limitation. Without some extensive, and unavailable, legislative histories, the internal evidence is not sufficient to establish that the drafters consciously intended such limitation.

In a couple of instances, however, there is slight evidence of some imperfectly defined desire to limit the taking power. The eminent domain clause of Vermont's 1777 constitution, which was never ratified by the people, and of the 1786 constitution, which was ratified, contains this phrase: "That private property ought to be subservient to public uses, when necessity requires it. . . ."[135] The problem, naturally, is what "necessity" means. The word may have been borrowed from the civil law writers, with some thought of limiting the power.

Then there is the Massachusetts 1780 constitution, the adoption of which has been documented. Article X of the Declaration of Rights mentions "public uses" twice.[136] The second sentence reads: "But no part of the property of any individual can, with justice, be *taken from him, or applied to public uses,* without his own consent, or that of the representative body of the people." So far, this is like the Pennsylvania wording. Then the final sentence adds: "And whenever the *public exigencies require* that the property of any individual should be appropriated to *public uses,* he shall receive a reasonable compensation therefor." Now, the entire compensation clause, indeed the entire bill of rights, was added after a proposed 1778 constitution was soundly rejected by the towns when it was submitted to them for ratification. In a number of instances towns gave the lack of a bill of rights as a reason for rejection, though we cannot cite anyone who complained specifically about lack of an eminent domain clause.[137] So, when the

134. Of course the Supreme Court now has adopted the principle that the due process clause of the fourteenth amendment guarantees compensation. Griggs v. Allegheny County, 369 U.S. 84 (1962). However, several of the early state constitutions contained both the Magna Charta formula and specific eminent domain clauses, suggesting the former were not thought to cover the latter. Compare the Delaware and New Hampshire citations in notes 131 and 133, *supra.*

135. VT. CONST., Ch. I, art. II (1777), found in 6 F. THORPE, FEDERAL AND STATE CONSTITUTIONS 3740 (1909); VT. CONST., Ch. I, art. II (1786), found in 6 *id.* at 3752.

136. The 1780 Massachusetts constitution is most readily available in 3 F. THORPE, FEDERAL AND STATE CONSTITUTIONS 1891 (1909). It also is in JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS BAY 225 (1832).

137. THE POPULAR SOURCES OF POLITICAL AUTHORITY 176-365 (O. Handlin & M. Handlin eds. 1966). All the towns of Essex County joined in a lengthy, learned,





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drafting committee reported the 1780 constitution to the convention, it contained Article X—minus the last sentence. That sentence was added by amendment from the floor and the amended article approved by the convention.[138] Who offered the amendment, what arguments he made, or whom he represented, the convention journal does not say. If the language "whenever the public exigencies require" is more than merely descriptive, or to the extent it betrays its author's state of mind, it shows a distrust of the legislative process that was no part of Lockeian theory. John Locke, of course, was responsible for the principle of legislative consent contained in the third sentence. He reposed great confidence in the legislature, and many American rebels, whom we take to be good enough libertarians, were content with that. But out there somewhere in the hustings, in Lenox or Plymouth or Beverly or Lexington or Pittsfield,[139] people sent a delegate who did not trust even representative government all that much. He wanted, first, to see the people's liberties perpetuated in a written bill of rights, and then he did not have enough faith in his legislative representatives to give them their head completely with his property.

A somewhat similar situation likely led to the adoption of the United States' fifth amendment with its eminent domain clause. Everyone knows, of course, that the original Constitution contained no bill of rights. The subject did come up. On 12 September 1787, five days before adjournment, Elbridge Gerry of Massachusetts moved, and George Mason of Virginia seconded, that a committee be appointed to draft a bill of rights, but the motion lost unanimously.[140] Three days later Mason objected to the Constitution because it had no bill of rights.[141]

passionate demand for a bill of rights, which was probably penned by the very conservative Theophilus Parsons.

138. JOURNAL OF THE CONVENTION, *supra* note 136, at 38, 194.

139. The choice of these towns is not wholly fanciful. When the convention met in 1779 to draft what became the 1780 constitution, Pittsfield directed her delegate to work for the language of the third sentence, though there is no evidence he was instructed on the last sentence. THE POPULAR SOURCES OF POLITICAL AUTHORITY, *supra* note 137, at 411. The other towns were ones that, in rejecting the 1778 constitution, complained that it lacked a bill of rights. *See* note 137, *supra*.

140. 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 582 (1911); J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION 630 (A. Koch ed. 1969). Some editions of Madison, and apparently a direct transcript of his notes, say the vote was 5-5, with Massachusetts absent. But Madison's handwritten notes agree with the official journal that the motion "passed in the negative" 0-10.

141. 2 M. FARRAND, *supra* note 140, at 637. In the end, Gerry and Mason, with Edmund Randolph of Virginia, were the delegates who refused to sign the Constitu-

That the Constitution would have failed ratification without an understanding that a bill of rights would be submitted may be putting the matter a bit strongly, but there were serious demands for one. Many amendments were proposed in the ratifying conventions of Maryland,[142] New York[143] and Pennsylvania.[144] However, while there was a popular groundswell for a bill of rights, we must frankly conclude that there is no evidence that eminent domain limitations were given much attention. Moreover, there seems no indication that the Revolutionary experience itself had created any particular alarm about the expropriation power. Examination of the Declaration of Independence and of ten other important Revolutionary documents revealed that, while the British were scoundrels in a thousand ways, they never abused eminent domain.[145] They surely would have been accused of it if they had. Add to this the fact, which we well know,

tion, affording the only occasion in history that Massachusetts and Virginia ever agreed on any political question. One suspects this strange fellowship was somehow connected with the desire for a bill of rights, but it is not clear whether the desire was a cause or effect of opposition to the Constitution.

142. In Maryland's ratifying convention, William Paca, who had signed the Constitution as a member of the federal convention, urged a number of amendments guaranteeing personal liberties and limiting federal powers. A committee, at one point, had worked up twenty-eight of them, none of which had to do with eminent domain. However, the committee reported no amendments, and the Maryland convention ratified without adding any. 2 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 547-56 (1836).

143. New York went a little further. At one point opponents of the Constitution as it stood, led by John Lansing, pushed through ratification "on condition" that a bill of rights and some other amendments would be added. Then the convention substantially changed its mind and changed the quoted words to "in confidence". The ratified version was preceded by a long series of recitals, mostly a bill of rights, that the convention declared it understood were "consistent" with the Constitution. Finally, the convention, over the signature of its president, George Clinton, circulated a letter asking the governors of other states to work for amendments. 1 *id.* at 327-31, 411-14. In none of this activity is there a record of any specific mention of an eminent domain clause.

144. In Pennsylvania, after the state convention had ratified the Constitution, a group of "gentlemen" met in Philadelphia and drafted some amendments they asked the Philadelphia legislature to propose to Congress. 2 *id.* at 542 542-46. Again, their draft contained no eminent domain clause.

145. The ten other documents are found in the two volumes of PAPERS OF THOMAS JEFFERSON (J. Boyd ed. 1950). Following are the documents, in each case the volume number being given in Roman and the page in Arabic: Jefferson's draft of a "Declaration of Rights" for the August 1774 Virginia convention (I, 119-35); Resolutions and Association of the 1774 Virginia convention (I, 149-54); Articles of Association forming the Continental Congress (I, 149-54); Declaration of the Causes and Necessity for Taking Up Arms, adopted by Continental Congress 6 July 1775 (I, 213-18); Jefferson's composition draft of the preceding (I, 193-98); Jefferson's fair copy of the preceding (I, 199-203); John Dickinson's composition draft of the preceding (I, 204-12); Jefferson's three drafts of the Virginia constitution of 1776 (I, 337-83). Incidentally, Jefferson's three drafts all contained a bill of rights but no eminent domain clause.

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that eminent domain had been hardly written on, and one wonders how it got into our constitutions at all. Yet, on 8 June 1789 James Madison presented his draft of twelve proposed amendments to the first session of Congress. His seventh, which became the fifth in the ratification process, contained double jeopardy, compulsory testimony, and due process clauses, followed by this eminent domain clause: "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation."[146] The suggestion of a public-use limitation is stronger than with the present language, but is it anywhere near conclusive? In any event, Madison's original draft was amended, which, if it signifies anything, may imply his language was too strong.

Here is a birdseye view of what seems to have happened with the public-use or public-purpose doctrine. The civil law writers Grotius, Pufendorf, and Bynkershoek, using varying semantic formulas, developed the notion that the exercise of eminent domain power should be restricted to somewhat more necessitous situations than should other governmental powers. American constitutional draftsmen, likely from familiarity with the civil law writers, assumed a similar notion, which they referred to obliquely but did not state explicitly. Considering especially that mill acts already existed in some colonies, it is doubtful that the draftsmen thought condemnation could be only for the literal use of the public. However, this was the meaning purportedly given in some nineteenth century decisions, though no such general rule ever really existed. Of recent years, while public-use language is still employed and may occasionally prevent a taking here and there, the courts are realistically following a public-purpose test.

Whether the test is stated as public-use or public-purpose, there is one thing about which American courts have always said they were adamant. Eminent domain cannot be used to transfer property from one private person to another.[147] That would violate the most fundamental Lockeian principle that governments were instituted to protect every man's property against his neighbor's depredations. But even this principle has proven flexible, for mill acts are generally valid, and some states confer private eminent domain power upon a landlocked owner who needs a road. Of course the opponents of urban renewal

146. Annals of Congress, 1st Congress, 1st Session, Cols. 433-36.
147. *See, e.g.*, Vanhorne v. Dorrance, 28 F. Cas. 1012 (No. 16,857), (D. Pa. 1795); Coster v. Tide Water Co., 18 N.J. Eq. 54 (1866).

argued that it was bad because it authorized *A*'s land to be condemned for sale to *B*. *Berman v. Parker*[148] and cases like it finesse the argument, and the doctrine, by shifting the public purpose from use of land to improving cities and removing slums. At this point the question Senator Tracy asked in *Bloodgood v. Mohawk & Hudson R.R.* becomes very hard. Where can the eminent domain power be limited?

Perhaps we should rephrase the question by asking: where *should* the power be limited? Bynkershoek seemed to agree with Pufendorf that, for instance, land should not be taken for a park, though the government might have unquestioned power to tax for and operate the park. If there is a justification for so limiting the power to take land, it must lie in some special evil that is associated with taking specific property interests but is not associated with other government acts.

What is so evil about expropriating specific property that is not evil about a general tax levy? One difference we have already seen: the specific taking makes the loser bear an unfairly large share of the cost of government. But we have also seen the law's response to this, which is the compensation requirement. What further evil lies in the specific taking that compensation will not cure? It would have to be some preferred status for the integrity of specific property in specific land or things. In other words, it would be a less serious act, an act that could be justified by lesser public need, for government, for example, to regulate proprietary uses or to levy a general tax, than to exact a specific interest. Certainly our private law of property has running through it a strong notion that a man is entitled to integrity of property. One cannot be forced to accept a substitute, even if he and everyone else agree it is better than what he has. Eminent domain, in essence, compels a substitution. On the other hand, there is, if anything, a stronger notion that his neighbor cannot take something for nothing. Taxation, in essence, forces this, or even viewed most benignly, forces a substitution of assets for government's protection and services. Viewed either way, taxation appears to violate the property principles at least as much as does eminent domain.

Still, perhaps there is some lurking reason to feel specially uneasy about exactions of specific property interests. Professor Sax articulates this in a way when he suggests that specific takings, which spend their

148. 348 U.S. 26 (1954).





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force on a single owner, have a certain capacity to tyrannize.[149] He made the suggestion as part of a theory in support of the compensation requirement, though its implications would, if anything, actually support a public-use or public-purpose limitation. The thought would be that the taking of property from a singled-out owner could be used by crafty rulers to penalize that owner. Taxation would do the same thing if it were individually selective. This illustrates that it is not only the loss of property interests that does the harm, for that occurs with the general tax levy, but the selectivity of the loss. However, for this harm to occur, we must assume the owner suffers, or perceives he suffers, some kind of loss that compensation, which we must assume will equal the objective value of the interest, does not assuage. In other words, we must assume owners attach a unique, non-monetary satisfaction to the holding of specific property interests. It is only through the non-compensable denial of this form of satisfaction that the disfavored citizen could be punished and tyrannized.

Do owners in fact attach this satisfaction to property that money cannot quench? Presumably there are no statistics on this, but it seems a reasonable answer would be, "sometimes yes, sometimes no." One may think about it for himself and will probably conclude he would be happy to be relieved of some items and not of others. All this would seem to make eminent domain a fairly unpredictable, and so, dull, tool for evil rulers to use to tyrannize selected subjects. No evidence has been found suggesting it has been so used. And, at any rate, if it were attempted, it would, in our legal system, be an arbitrary act that could be enjoined as a denial of due process. Any potential for harm is more theoretical than real.

The conclusion is that there is no sufficient reason to limit the exercise of eminent domain any more than of other powers of government. All exercises, including regulations and taxations, are intrusions upon individual liberty, but they are necessary to prevent greater human losses in an interdependent society. Eminent domain poses no special threat to the individual that would require special limitations on the occasions of its exercise. It is not black magic, but merely one of the powers of government, to be used along with the other powers as long as some ordinary purpose of government is served.

None of this, however, speaks to the special problem of eminent

149. *See* note 115 and accompanying text, *supra*.

domain's being used to transfer *A*'s property to *B*. Take that simple case: government pays for and condemns *A*'s land and immediately gives it to *B*. No one will seriously contend that the transfer was not from *A* to *B*, just because the land paused momentarily in the government. If the act was done because *B* was the governor's brother or political supporter or some such, it is void as offending due process and probably equal protection. It also fails to meet the test of public purpose set out above. Suppose, however, it is the declared and accepted public purpose of the state to assist needy persons, among whom *B* is the neediest. At this point the Lockeian political theorist will be greatly upset: governments were instituted to protect and preserve property rights that members of society brought into or acquired within society. If, in the name of serving society and protecting us all from the depredations of ragged beggars, government directly takes our land and gives it to them, surely the process has come round full circle and has defeated itself. Given his predilections, the Lockeian is right.

Suppose, however, one accepts a more Rousseauist philosophy of government. Certainly if he shares the collectivist ethic that we are all trustees of property for the state, then the state may do as it wishes with its land. Or even if he accepts Rousseau's idea that it is the function of the state to see that all have enough and none have too much, the transfer from *A* to *B* is a proper act, at least if *A* has too much as well as *B*'s having too little. In other words, even if we assiduously apply the public purpose test, it does not tell us whether *A*'s land can go to *B* unless we have determined our governmental purposes. Thus, when a court says *A*'s land cannot go to *B* because there is no public purpose, it is assuming a particular role of government without saying so.

The fact is that our society has never been wholly Lockeian or wholly Rousseauist. Maybe it is truer to say people often do what is expedient and do not always check with their theoreticians before they act. The mill acts, which we have seen existed in colonial times, allowed the transfer of water and flowage easements from *A* to *B*. Railroads, turnpikes, and various public utilities have, nearly since the beginning of the Union, enjoyed the power to condemn *A*'s land unto themselves. Certainly the public benefitted by being able to use the facilities (for a price), but that does not change whose land went to whom. Urban renewal, whether it occurred in the 1950's, as in





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*Berman v. Parker*,[150] or a hundred years ago, as in *Dingley v. City of Boston*,[151] allows *A*'s land to be condemned for *B* when this would serve some purpose legislatively designated and judicially accepted as public.

If there is a doctrine that property cannot be condemned from one person to be transfered to another, it has some large exceptions. Any such doctrine would flow from a public-purpose limitation only if, in a pure Lockeian theory, it were always against public policy to allow such transfers. What the courts mean to say, and what might be defensible statistically, is that such transfers tend more than transfers to the government to be for non-public purposes and so more or less tend to be suspect. We must still inquire in each case what are the public purposes, according to the theory already worked out.

## IV. THE PROPERTY CONCEPT

If there is one categorical thing we can say about eminent domain, it is that it always concerns property. This statement rests on nothing more nor less than a convention, almost a definition, just as the meaning of all language must rest on convention or communication is impossible. Of course one might speak of the condemnation of life, liberty, or the pursuit of happiness, but one does not because Grotius, Pufendorf, Bynkershoek, Vattel, Locke, the Massachusetts Declaration of Rights, the fifth amendment, Chancellor Kent, and *Nichols on Eminent Domain* do not.

We now can add to a definition of eminent domain that was begun at an earlier point in this article: it is a power of government by which property of private persons may be transferred to the government, or to an alter ego such as a public utility, over the transferor's immediate, personal protest. It is encouraging to progress to this point, but once again it is all too evident we have bitten into another large question. What is "property"? Two lines of inquiry provide a foundation for answering this question: First, the historical development of the property concept in eminent domain, and second, the correct theoretical model of that concept.

Down to the time when the United States and early state constitu-

150. 348 U.S. 26 (1954).
151. 100 Mass. 544 (1868).

tions were adopted, the few writings there were on eminent domain spoke of the taking of "property."[152] Never, in these sources, nor, so far as has been found, in any source, was there any attempt to describe or define what was meant by "property." That basically was the situation when the fifth amendment, like the other early constitutions, referred to the taking of "property." Superficially we have a definitional problem, but so are questions about what is "God," "law," and "justice"—superficially. In the pre-Revolutionary era land had been taken by being physically invaded by public projects like roads, bridges, and drainage works. These kinds of appropriations do not force difficult decisions on the taking of property. The difficult decisions are forced by cases that involve no physical touching of the alleged condemnee's land.

To identify the problem more narrowly, it arises out of the ambiguous character of the word "property." Hohfeld observed this, the word's capacity for denoting the physical thing or, alternatively, legal interests pertaining to the thing.[153] In the words of Morris R. Cohen, "Anyone who frees himself from the crudest materialism readily recognizes that as a legal term property denotes not material things but certain rights."[154] Property, like beauty, exists in the eye of the beholder—provided he is legally educated. But ask your local real estate man what he thinks "property" is or—let us quit pretending—listen sometime to lawyers carrying on a casual conversation about "that property down on the corner."

Suppose that some governmental entity, such as the Village of Newburgh, New York, takes its water supply out of a stream that

152. H. GROTIUS, DE JURE BELLI AC PACIS 807 (F. Kelsey transl. 1925); S. PUFENDORF, DE JURE NATURAE ET GENTIUM 1285 (C.H. & W.A. Oldfather transl. 1934); C. VAN BYNKERSHOEK, QUESTIONUM JURIS PUBLICI 218-23 (T. Frank transl. 1930); E. DE VATTEL, THE LAW OF NATIONS 96 (C. Fenwick transl. 1916). This was also true of Locke and Blackstone when they wrote that an owner might be divested of his "property" only by his own consent or the consent of his legislative representatives. J. LOCKE, AN ESSAY CONCERNING CIVIL GOVERNMENT, Ch. XI, at 378-80 (P. Laslett ed. 1960); 1 BLACKSTONE, COMMENTARIES *138-39. Likewise, colonial highway acts, such as Massachusetts', generally required compensation for one's "Proprietary or Improved Grounds" or some equivalent words. Mass. L. 1693, Ch. 10, contained in ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF THE MASSACHUSETTS-BAY 47-49 (B. Green printer 1726). The constitutions adopted during the Revolution, when they had eminent domain clauses, spoke of the taking or appropriation of "property," as did the Massachusetts Declaration of Rights of 1780. MASS. CONST., Declaration of Rights, art. X (1780), found in 3 F. THORPE, FEDERAL AND STATE CONSTITUTIONS 1891 (1909).

153. W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 28 (Cook ed. 1919).

154. M. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 11 (1927).





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flows through the plaintiff's land. His water level is appreciably lowered, so that he now fails to receive enough water for his domestic and commercial uses. Has he lost "property" in the form of riparian rights? Not if we say his protected "property" is the land, for there has been no physical invasion. Chancellor Kent did allow compensation in 1816 in *Gardner v. Trustees of Village of Newburgh,* recognizing a non-physical concept of property.[155] A few years later New Hampshire reached a consistent result in a case in which the holder of a bridge franchise was held to have a compensable interest in the franchise.[156]

Quite to the contrary was the Massachusetts decision in 1823 in *Callender v. Marsh,*[157] the best known and most influential of the early cases. This was the original change-of-grade case, in which the cutting down of a street blocked an abutting owner's access onto it. Though an abutter is now and was then supposed to have an easement of access, the court refused compensation, one reason being that no land had been touched. Why should "property" be conceived of in its physical sense? The famous Chief Justice Gibson of Pennsylvania explained in another influential decision, *Monongahela Navigation Co. v. Coons,* that this was so because "Words which do not of themselves denote that they are used in a technical sense, are to have their plain, popular, obvious, and natural meaning."[158] Gibson, in other words, preferred the real estate man's meaning of "property." Additionally, the courts advanced the practical reason that it would be a severe burden if condemnors had to pay for "consequential" damage; that is, harm to intangible interests.[159]

The popular notion became, "no taking without a touching." It would be something of an oversimplification unreservedly to label the physical concept of property the "older" view. For one thing, it has

155. 2 Johns. Ch. 162 (N.Y. 1816). The "property" question was not, however, the most hotly contested issue. Chancellor Kent was faced with a situation in which New York, at the time the injury occurred, had no eminent domain clause in its constitution. He had to, and did, work out a theory of compensation on natural law grounds.

156. Proprietors of Piscataqua Bridge v. New-Hampshire Bridge, 7 N.H. 35 (1834). The plaintiff held a franchise from the state to maintain a bridge on a certain stretch of river. Later, when the state granted another franchise to the defendant within the same stretch, this was held a taking of the plaintiff's franchise.

157. 18 Mass. (1 Pick.) 418 (1823).

158. 6 Watts & S. 101, 114 (Pa. 1843).

159. Commissioners of Homochitto River v. Withers, 29 Miss. (7 Cush.) 21 (1855); O'Connor v. Pittsburgh, 18 Pa. (6 Harris) 187 (1851).

had its opponents, not only Chancellor Kent, but others, mostly legal writers, for over a hundred years.[160] At the other end of the equation, the physical concept still exerts a heavy influence in some opinions.[161] Nevertheless, the trend has been away from a touching requirement, with increasing acceptance of takings without any physical invasion. Some examples of this trend follow.

Where access is not limited or denied in the original opening of the way, an abutting owner is judically recognized to have an easement of reasonable access upon a public street or road and thence to the general system of public ways. If some entity having eminent domain power blocks or denies this reasonable access, there should in theory be a taking, wholly or partially, of this easement. *Callender v. Marsh,* of course, denied compensation where the blockage was by a change of street grade. Except for a few jurisdictions, *Callender's* influence was so great that compensation is still denied on those facts unless a constitutional clause allows compensation for a "damaging" or unless a statute allows it. However, over half the states have such clauses or statutes. In fact patterns other than change of grade, which have tended to develop after the middle of the nineteenth century, the courts have been influenced little by *Callender's* hard and fast rule. We have in mind phenomena such as street closures, declarations of no access or of limited access, blockage of the abutting street at some point before the next intersecting street, and the closure of the original abutting street accompanied by the opening of a new one that gives poorer access. Of recent years freeways and limited-access highways, which cut across established road networks, have produced many of these fact patterns. Certainly there has been a great deal of judicial inconsistency in these situations, with some strange twists and turns of doctrine. Still and all, the long-range tendency has been toward giving compensation on account of unreasonable loss of access.

Another kind of property right that may be lost or diminished without a trespassory invasion is included under the label "riparian rights." A riparian owner is recognized to have property rights in the

160. 1 J. LEWIS, EMINENT DOMAIN 52, 55 (3d ed. 1909); T. SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW 524 (1857).

161. *See, e.g.,* Batten v. United States, 306 F.2d 580 (10th Cir. 1962) (no property taken by noise, vibration and smoke from airplane flights); Nunnally v. United States, 239 F.2d 521 (4th Cir. 1956) (no property taken by noise and shock from cannon); Randall v. City of Milwaukee, 212 Wis. 374, 249 N.W. 73 (1933) (no compensation for "consequential" harm from partial blocking of street access).



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adjacent water, chiefly continuation of the body of water substantially in its natural state, limited uses of it, and access to it. These rights may more or less vary locally, depending upon the existence of doctrines such as an appropriation system for allotting use of water. Whatever his rights are under local law, the owner may suffer loss or diminution of them due to the acts of a body having eminent domain power. Some of the common acts are blockage of access, water pollution, changes of flow or level, and restrictions of his use of the surface. In these fact patterns many decisions do recognize that a taking may occur. However, the status of the taking theory is complicated by what might be called the intrusion of other theories. In some cases, particularly those involving water pollution or restrictions on surface use, courts prefer to analyze the problem by use of nuisance theory or by considering the acts of the public body as an exercise of police power. A larger intrusion is the navigation-servitude doctrine, under which private riparian rights are subservient to the power of government, usually the federal government, to regulate navigation. So, for instance, a governmental blocking of access or surface use that otherwise would be a wrong and a taking will not be such if the court finds the government acted under its power to regulate navigation. The upshot of all this is that, while riparian rights are recognized as property subject to being expropriated, recognition of the right is masked in many cases by the application of several theories.

One who owns a parcel of land will or may have certain property rights that extend to lands the general possession of which is in others. He may have the benefit of an appurtenant easement; a restrictive covenant; or rights of light, air and view; and will be entitled to lateral support from his neighbor. If these rights be viewed as species of property, they should be capable of being taken by an eminent domain act. In the nature of things, this act will always occur outside the benefitted lands, as where some government project on the servient or burdened land blocks the easement or is contrary to the restriction of the covenant. Since the Supreme Court decision in *United States v. Welch,*[162] the courts have not hesitated to grant compensation for easements. With restrictive covenants many courts, though probably now a minority, have refused compensation, finding no "property" affected and fearing to open the floodgates to claims they feel would

162. 217 U.S. 333 (1910).

be nebulous and burdensome. There is a small amount of authority on the taking of lateral support that indicates it normally will be recognized as compensable property.[163] Regarding loss of light, air, and view, the decisions are so few that it is hard to say what has been the course of development.

There is a final kind of interest that only a handful of courts have recognized as condemnable property, and then often hazily. An owner of land has a right to be free of certain kinds of annoying activity from occupiers of other land. This is the law of nuisance, which lies at the intersection of our categories of tort and property law. If a governmental agency conducts such an activity nearby, of course the injured owner may not enjoin the activity, but might he not claim the government had extinguished and taken his landowner's property right to be free from such nuisances? The main cause of claims today is the noise, dust, and fumes from jet aircraft landing and taking off from publicly owned airports. A half-dozen or so jurisdictions have allowed compensation in cases involving airports, garbage dumps, and disposal plants. Many more decisions, of which the Supreme Court's *Richards v. Washington Terminal Company*[164] is the leading example, will allow compensation if the harm is especially serious and peculiar to this plaintiff. Of course, when compensation is allowed in any of these cases, it implies a property interest was affected, though the courts typically do not openly identify or describe the interest. The area is an eminent domain frontier where the courts still need to formulate an adequate framework of analysis.

We see, then, that American courts were, in effect, originally told to award the expropriation of "property" without being told what it was. Most early nineteenth century courts began by assuming the word could be applied in its popular physical sense. That concept proved inadequate and unacceptable in many situations that began to arise where an owner had obviously lost a valuable right, yet there had been no touching of his land. Increasingly, therefore, courts have been willing to say "property" has been taken without a physical invasion. While the trend is in that direction, the change is by no means com-

163. In some cases the loss of lateral support was caused by excavation for a change of street grade. If the court, under the influence of *Callender v. Marsh*, refuses compensation for loss of access from this cause, it may also refuse compensation for the loss of support. *See* note 157 and accompanying text, *supra*.

164. 233 U.S. 546 (1914).





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plete. For one thing, the shadows of the nineteenth century linger. For another, courts often show their fear to lift the lid off a Pandora's box of eminent domain claims.

Let us now inquire into the theoretical model for "property" as the concept ought to be used in eminent domain. The starting point is our earlier discussion of the act of taking.[165] We there said that a taking involves the transfer of property from an owner to the condemnor. The transfer, indeed, is one that might have been, and of course frequently is, made as the result of a negotiated bargain. "Eminent domain" is a power of the sovereign to require, in theory to give legislative consent for, the transfer—and that is all it is, a power. Eminent domain does not make the transfer; it is not the transfer. It only requires that the transfer be made. The transfer itself is no different from a freely negotiated one between the owner and the government.

What sorts of things might an owner transfer? The answer reads like the introductory chapter of a treatise on property law, where we learn about "interests in land": fees simple, future estates, leaseholds, easements, riparian rights, restrictive covenants, *et cetera*. These are what the owner owns, and there is a way he can create or transfer each one of them.[166] Eminent domain transfers are no different; they are of the same kinds of interests as the owner might grant, convey, assign, release, sell, or lease to anyone. To anyone: what this says is that the interests transferred to the sovereign are the same interests as those recognized in the law of property among private persons.

Putting this together with something developed at an earlier stage,[167] no act of eminent domain occurs unless there is a transfer to the government and unless the transfer is of an interest such as an owner might transfer to a private person. And, of course we add, parenthetically, that the transfer has occurred over the owner's immediate, personal protest. Will this work in practice? This question, too, was discussed at an earlier point, where the suggested test was found to produce rational results even in difficult fact patterns.[168] Perhaps the most difficult case to analyze is the loss of street access caused by, say, a whole or partial driveway closure. What property interest such as

165. *See* part I, *supra*.
166. A possible exception, of no consequence here, is that the attempted alienation of a right of entry, arguably also of a possibility of reverter, might terminate it.
167. *See* notes 58-59 and accompanying text, *supra*.
168. *Id*.

the owner might transfer to a private person has he transferred to the city? The interest involved is an elusive one, for it is the easement of access the owner had onto the city's own street. It was not precisely an easement against another private person, though it was the kind of right one might hold against a private person. The city's act of blocking access wholly or partially extinguished the easement or, in other words, worked a whole or partial release of it to the city.

The definition of "property" also fits some larger purposes that eminent domain should serve—that its very existence seems to imply. Underneath the idea that a citizen should be compensated at all by his government, there runs the current that, insofar as possible, the state should be no better off with him than if the state had been another private person. The necessities of maintaining a government require that it have the power to extract property, including tax money, from its subjects. The Lockeian principle of just share requires that, in specific extractions, such as eminent domain brings, citizens be evened up among themselves with compensation.[169] In harmony with this principle, if not actually symmetrical, is the principle suggested, that government should stand on the same footing as a private person as respects the kinds of property interests that are subjects of eminent domain. For the condemnee this does obvious justice by insuring him payment for whatever a private person would pay for. It also does justice to the condemnor by insuring that compensation will not be due for unknown and exotic interests. We might mention also that the invariable measure of the amount of compensation, market value, can work only when the interest being valued is one recognized on the private market.

The conclusion is that "property" in eminent domain means every species of interest in land and things of a kind that an owner might transfer to another private person. With this our exploration of the elements of eminent domain is finished.

## A FRAMEWORK OF ANALYSIS

This short final section will not be a summary or conclusion in the usual sense. It will instead attempt to lift out the basic elements of eminent domain that have been developed in theory and to arrange

169. *See* notes 53 and 111 and accompanying text, *supra*.



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them into an order that will allow them to be applied. The intended product is a framework of analysis that can be used to solve taking problems, both those where there is and those where there is not a touching of the would-be condemnee's land.

We have three separate questions we must answer before we can determine whether a claimant is entitled to eminent domain compensation. First, we must determine if a property interest of the kind that could pass between private owners is involved or has been affected. As a practical matter, this question of "property" is often so bound in with the "taking" question that the two are difficult to think of separately. But it aids analysis to do so, even if this forces a certain amount of artificial conceptualizing. We must be able to identify a known species of private property interest or, whatever has happened and regardless of whether causes of action may exist on other theories, there will be no exercise of eminent domain.

Assuming "property" is involved, the second question is whether that interest has been "taken." The critical inquiry in this step is whether the property interest has been transferred from an owner to the condemning entity. This can be very difficult. Suppose a city should impose building height limits as part of a zoning scheme. Normally this will not constitute a taking because, admitting arguendo that there has been a kind of redistribution of property interests similar to covenantal height restrictions among private owners in the zone, there has been no transfer to the city. But if we may imagine a fantastic situation in which the city owned a great deal of land in the zone and passed the ordinance for the benefit of that land, then a taking may arguably have occurred. Or suppose the city passes a traffic safety ordinance prohibiting abutters on a certain street from driving onto it. A taking has occurred, because the city has in effect compelled a release by the owners of the access easement they formerly had against the city's street. Certainly the ordinance also is a police-power regulation, but one should not fall into the trap of thinking it cannot therefore be a taking; it is both. A great deal of precise thinking is needed to determine if a transfer to the state has occurred. It must then be asked whether this transfer was without the immediate, personal consent of the owner, but the answer is generally apparent.

If "property" has been "taken," one may say there has been an attempted exercise of the eminent domain power. The final question is

whether the governmental entity, assuming it is an agency generally vested with eminent domain power, may invoke the power in this instance. At stake is whether the government's acts in taking the property interest are in furtherance of some object that is within the power of that particular governmental body. In the (increasingly rare) cases in which this question is answered in the negative, the attempted taking should of course be judicially enjoined. If the question is answered affirmatively, compensation will be due.

This framework of analysis may be deceptively simple. The steps may seem too mechanical. But behind each step is a theory that has its foundation in our historical conception of a people and their government. Most courts would do well to follow the framework if they never got beyond the mechanics of it. They would do better if they were led to look beyond the framework to its foundations.



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1A Wash. Prac., Methods of Practice § 60.6 (4th ed.)

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by David O. Thompson[FN*]

## § 60.6. Authority—Eminent domain

### West's Key Number Digest

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C.J.S., Eminent Domain § 24

Like the police power, eminent domain is a special area of authority, based on the fundamental principle that owners hold their property subject to the needs of the public corporation. Unlike the police power, powers of eminent domain are derived from legislative grants of authority, not directly from the constitution.[FN1] Powers of eminent domain are construed strictly against municipalities,[FN2] so all classes of cities have essentially the same powers.[FN3] The procedures that cities and towns must follow when exercising their powers of eminent domain are fixed by statute.[FN4] Basically, a decree of public use and necessity to condemn may be entered only when (1) the use is really public, (2) the public interests require it, and (3) the property to be condemned is necessary for the purpose.[FN5] Both the federal and state constitutions require just compensation when private property is taken for public use.[FN6] Just compensation requires that property owners be put in the same position monetarily as they would have occupied had the property not been taken.[FN7] In cases of inverse condemnation,[FN8] property is taken before just compensation is paid. For that reason, property owners are entitled to interest in such cases.[FN9]

[FNa0] Seattle University School Of Law, Member Of The Washington Bar.

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[FN*] David Thompson is an attorney with the law firm of Preston, Gates and Ellis, practicing in the areas of municipal law and municipal finance. In writing this chapter, the author received considerable assistance from other members of the firm.

[FN1] *See, e.g.,* Teply v. Sumerlin, 46 Wn.2d 504, 282 P.2d 827 (1955); Gasaway v. Seattle, 52 Wash. 444, 100 P. 991 (1909).

City's condemnation powers also applied by inference to transportation authority created by city. HTK Management, L.L.C. v. Seattle Popular Monorail Authority, 155 Wn. 2d 612, 121 P.3d 1166 (2005).

[FN2] *See, e.g.,* In re Seattle, 96 Wn.2d 616, 629, 638 P.2d 549 (1981).

[FN3] *See* Trautman, *Legislative Control of Municipal Corporations in Washington,* 38 Wash.L.Rev. 743, 774 (1963).

[FN4] For further information, see Sinnitt, *Eminent Domain,* in 3 Real Property Deskbook ch. 69 (Wash. State Bar Ass'n, 2d ed. 1986).

[FN5] Schreiner v. Spokane, 74 Wn.App. 617, 874 P.2d 883 (1994).

A declaration, by a legislative body, of public necessity for the condemnation is conclusive, in the absence of proof of actual fraud or such arbitrary and capricious conduct as would constitute constructive fraud. In re City of Lynnwood, 118 Wn.App. 674, 77 P.3d 378 (2003).

The Constitution prohibits the taking of private property for a private use, but as long as the property was condemned for the public use, it may also be put to a private use that is merely incidental to that public use. PUD v. North American Foreign Trade Zone Industries, LLC, 125 Wn.App. 622, 105 P.3d 441 (2005), review granted.

[FN6] WASH. CONST. art. I, sec. 16 (amend. 9); U.S. CONST. amend V.

In Eggleston v. Pierce County, 148 Wn.2d 760, 64 P.3d 618 (2003), the court held that the eminent domain provision of the state constitution does not require compensation to be paid for seizure and preservation of evidence, or for destruction of property by police activity.

In Dickgieser v. State, 153 Wn. 2d 530, 105 P.3d 26 (2005), the court held that damage to private property that was reasonably necessary to log state lands was for a public use, requiring compensation.

[FN7] Sintra, Inc. v. Seattle, 131 Wn.2d 640, 935 P.2d 555 (1997). In eminent domain context, just compensation is the fair market value of the property. State v. Costich, 117 Wn.App. 491, 72 P.3d 190 (2003).

[FN8] *See* RCWA 8.04.090. A constitutional taking (inverse condemnation) requires a permanent or recurring invasion, whereas a claim of trespass does not. Phillips v. King County, 87 Wn.App. 468, 490, 943 P.2d 306, 319 (1997).

In an inverse condemnation action the property owner institutes the action alleging that the government has effectively taken his property, as opposed to a condemnation action in which the entity possessing the condemnation power initiates court action. Olympic Pipe Line Co. v. Thoeny, 124 Wn.App. 381, 101

1A Wash. Prac., Methods of Practice § 60.6 (4th ed.)

P.3d 430 (2004).

[FN9] Sintra, Inc. v. Seattle, 131 Wn.2d 640, 935 P.2d 555 (1997). The court said that the interest awarded was not prejudgment interest, but rather part of the damages. RCWA 8.28.040 provides for postjudgment interest in eminent domain proceedings.



1A WAPRAC § 60.6

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17 Wash. Prac., Real Estate § 9.20 (2d ed.)

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Chapter 9. Eminent Domain
B. Constitutional Limitations

## § 9.20. Public-use doctrine

### West's Key Number Digest

West's Key Number Digest, Eminent Domain 13 to 15
West's Key Number Digest, Eminent Domain 17
West's Key Number Digest, Eminent Domain 61

### Legal Encyclopedias

C.J.S., Eminent Domain § 27

C.J.S., Eminent Domain §§ 29 to 30

C.J.S., Eminent Domain § 52

C.J.S., Eminent Domain § 55

A well-known tidbit of American history is that, as Lord Cornwallis surrendered to Washington at Yorktown, the British band played a tune called, "The World Turned Upside Down." For many years, the most critical—certainly most celebrated—question under the "Takings Clause" of the Fifth Amendment to the United States Constitution, and more recently under the equivalent Article I, Section 16, of the Washington State Constitution, has been whether, and if so when, a land-use regulation amounts to a "taking." A dramatic United States Supreme Court development in 2005—judging by the intensity of public reaction, perhaps the Court's most significant development in non-criminal law—together with a 2005 Washington Supreme Court decision, has shifted the honor of "most critical" to the "public use" clauses of both constitutions. Suddenly—just in 2005 alone—it begins to seem that "honor" has passed to the "public use" clauses of those two constitutions and the equivalent clauses of some other state constitutions. Even if this development does not have quite the historic significance of Yorktown, it

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looks as if everything we knew about the concept of "public use" has turned upside down.

The "public-use doctrine" needs to be discussed separately for federal law and Washington State law, for on this question the two bodies of law diverge. In the United States Constitution, the fifth amendment eminent domain clause reads, "nor shall private property be taken *for public use* without just compensation." (Emphasis added.) If one were to read this language unaided (or encumbered) by judicial decisions, it would seem from the position of the words "for public use," that they were only descriptive and not limiting. In other words, it would not seem that they should be read, "private property *shall be taken only for public use* and then only upon just compensation." Yet, to an extent that varies from jurisdiction to jurisdiction, many courts have put the latter meaning upon the language, so that the eminent domain power may be exercised only if the object is to provide for the "public use." The general thrust of the public-use doctrine is that the power of eminent domain may be used only for public purposes that are to a greater or lesser extent more urgent than the public purposes that will justify government's exercises of its other powers. For instance, we know that the police power may be exercised if it promotes the " public health, safety, or welfare," a very deferential standard. Under the public-use doctrine, the thought is that the eminent domain power may be exercised only in a narrower range of circumstances.

Thus, it becomes critical to define what "public use" means. At one extreme, a few states have adopted the literal position that land may be taken only if it will be open for physical use by members of the public.[FN1] For instance, there is Washington authority for that position, though there is also inconsistent Washington authority for a more flexible position.[FN2] We will discuss Washington's position in detail in a moment; it is mentioned here only by way of example.

At the other extreme is the position that "public use" means only "public purpose"—that, directly or indirectly, some public purpose is served or furthered by the taking of private property. In Hawaii Housing Authority v. Midkiff[FN3] and Berman v. Parker,[FN4] the United States Supreme Court so interpreted the fifth amendment. Indeed, the concept in Midkiff and Berman is that the power of eminent domain is an ancillary power to the other powers of government, so that it may be used anytime they are used, to further their purposes. This view of eminent domain, of course, imposes no more limitations upon its exercise than are imposed upon exercise of the other powers of government.

First, we need to recall the Michigan Supreme Court's noted (some say "notorious") 1981 decision in *Poletown Neighborhood Council v. City of Detroit,*[FN4.05] in which that court held the city might condemn private land to turn it over to General Motors for an assembly plant. *Poletown* was widely viewed as the most permissive, expansive interpretation of the "public use" element of eminent domain. In 2004, Michigan explicitly overruled *Poletown* in *County of Wayne v. Hathcock.*[FN4.10] In 2005, in *Kelo v. City of New London,*[FN4.15] the Connecticut Supreme Court faced a question eerily similar to that Michigan had faced in *Poletown*. Was it "for public use" under the Federal Constitution for New London to condemn a group of private residences, to clear the land and sell it to a group of commercial interests, most notably Pfizer Chemical Company, which planned to use the land for a research facility? In view of Michigan's then-recent decision in *Hathcock*, it was natural to suppose Connecticut might have held, "not for public use." Instead, the Connecticut Supreme Court, in a split decision, held, "yes." "Public *use*," in a word, became "public *benefit*": it benefitted the City of New London's citizens to trade the Pfizer facility and the other commercial enterprises, with the business, the shiny new buildings, the jobs, they would bring, for the aging, perhaps dowdy, though respectable, private homes. What *Hathcock* had put to death in Michigan, *Kelo* resuscitated in Connecticut.

Enter the United States Supreme Court. The Court accepted certiorari in *Kelo*, and, since that busy Court does not lightly review state court opinions, one might have supposed that the Court was unhappy with Connecticut's treatment of the U.S. Fifth Amendment's "public use" clause. Four members of that Court were, indeed, unhappy, very unhappy, but *only four*. By a five-to-four margin, the Court affirmed Connecticut in *Kelo v. New London* in an opinion written by Justice Stevens.[FN4.20] Repeatedly, Justice Stevens's opinion substituted the phrase "public *purpose*" for the Fifth Amendment's phrase, "public *use*," and his analysis is consistent with that substituted phrase

and with the substituted phrase "public *benefit*." Justices O'Connor and Thomas wrote strong dissenting opinions.[FN4.25] The Supreme Court's opinion in *Kelo* occasioned widespread and intense concern and comment by, not only the news media, but by large numbers of the public, many of whom were "ordinary citizens" who had not previously, in such numbers, expressed concern about earlier important Supreme Court decisions under the Fifth Amendment's "Takings Clause."[FN4.30]

Washington, as just suggested, has at least the reputation of being at the other extreme from the Supreme Court, and this is the main current of Washington authority on "public use." On this question, Washington is free to differ from the Supreme Court, because Washington is interpreting its own constitution, which differs materially from the United States Constitution.[FN5] Article I, Section 16, of the state constitution contains a provision not in the Federal Constitution, that "whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public." This language is responsible for Washington's procedural requirement that there be a separate hearing on the question of public use and necessity.[FN6] Under authority of that language, the Washington Supreme Court has rejected the view that " public use" means "public purpose" and has adopted the contrary position that "public use" means "use by the public." The leading decision is In re City of Seattle (In re Westlake Project),[FN7] which held that the city could not condemn land for any part of a project that would include retail shops to be leased out to private businesses. They would not be places open to the public generally. Other parts of the proposed project, such as a public plaza and a parking garage, were public places, but the retail shops, a substantial element of the entire project, poisoned it all.

Hogue v. Port of Seattle[FN8] is the other leading Washington decision for the rule that "public use" means " use by the public." Despite enabling legislation that purported to allow port districts to do so, the Washington State Supreme Court held that the port district could not condemn land to be cleared and resold to private companies for use as an industrial park. The enabling legislation contained a recital that the proposed use was a public one, but, quoting the language from Article I, Section 16, the court said that, while the legislative determination was entitled to respect, the question of public use was finally a judicial question. Because the industrial sites would be occupied by private companies, they would not be areas open to the public. Several years after Hogue came down, the people adopted the 45th amendment to the state constitution, which expressly declared that port-district condemnations for industrial parks and some related uses "shall be deemed a public use for a public purpose."[FN9 ] So, while the precise result in Hogue has been nullified by constitutional amendment, that does not change its general principle that public use means use by the public.

It should be added that use by the public does not mean that a particular project has to serve any great number of the public, as long as it is open to them generally. State v. Belmont Improvement Co.[FN10] holds that a short dead-end road that was open to the public was for public use, even though only one home was at the end of it. The court said it was the public character of the project, and not the amount of public use it would have, that made it public. Also the fact that a private developer will dedicate land for and construct the project does not prevent its being for public use.[FN11]

Perhaps it will be useful at this point to cite to a number of decisions in which various kinds of uses have been held to be public. Bear in mind that, as discussed in section 9.4, when condemnation is by local governments, they must have specific statutory authority to condemn land for the proposed purpose.[FN12] Assuming there is such authority, the following uses have been held to be "public": roads and highways;[FN13] public schools;[FN14] parks, recreational grounds, and parkways;[FN15] water supplies and systems;[FN16] sites for waterpower and electricity generation, including the properties and franchises of private utility companies;[FN17] sanitary sewers and sewage treatment facilities;[FN18] flood control projects;[FN19] irrigation projects;[FN20] and public marinas.[FN21] The list of uses is not exhaustive, but only representative, either as to the kinds of uses that are public or as to the number of decisions that might be cited for the uses listed.

Washington has some decisions that are inconsistent with, if not completely contrary to, the line of decisions

represented by In re City of Seattle and Hogue v. Port of Seattle, which were discussed above. Miller v. City of Tacoma,[FN22] which came down after Hogue and before Seattle, held that the city might, under state enabling legislation, condemn land for an urban renewal project. The steps in urban renewal are the condemnation of " blighted" land, clearing the land, sale to private developers who are contractually bound to redevelop it in certain ways, its redevelopment, and ultimately its resale or lease to private persons who will occupy it. Simply to describe these steps makes it obvious that the result in Miller is inconsistent with the result in In re Seattle and particularly with the result in Hogue. The only factual difference between Miller and Hogue is that in Miller the objective was to replace blighted land with an urban renewal project, and in Hogue the objective was to replace existing uses with an industrial park. Miller of course recognized the public-use issue, which the court answered with two arguments: (1) the legislative declaration that blighted areas threatened the public health, safety, morals, and welfare was entitled to "great weight"; and (2) many other jurisdictions had approved condemnation of land for urban renewal. An attempt was made to distinguish Hogue on the basis that the words "public use" "must be applied to the facts of each case in the light of current conditions." Miller was followed by the Washington Court of Appeals in City of Seattle v. Loutsis Investment Co.,[FN23] which held that condemnation for shops to be leased to private businesses in Seattle's public market was for a public purpose. The enabling city ordinance declared, and the court agreed, that expansion of the public market was part of an urban renewal plan.

A state supreme court decision in In re Port of Seattle,[FN24] which like Miller came down after Hogue and before In re City of Seattle, is also difficult to reconcile with those decisions, especially with the Seattle case. The port district, which owned and operated Seattle-Tacoma International Airport, was legislatively authorized to condemn land for "handling, storage and terminal facilities." Under this authority the district proposed to condemn land to be developed with air cargo handling facilities and then to be leased to private cargo carriers. This, the court held, was for public use. Hogue was distinguished on the ground that, unlike Hogue's industrial park, the cargo facilities would be "an integral part of an airport operation which serves a public purpose." Even if that distinguishes the earlier decision in Hogue, it does not distinguish the shops to be leased to private stores in the later case of In re City of Seattle.

What is the state of the law in Washington on the public-use doctrine, besides being unsatisfactory? Since In re City of Seattle is the latest decision of those mentioned so far, it presumably controls to the extent it is inconsistent with the earlier decisions. That, plus the fact that the public-use issue was the entire focus of a lengthy, elaborate decision, is the reason it was earlier stated that its view is the "main current" of Washington law. Judge Utter wrote in his dissent in that case that the court's decision overruled In re Port of Seattle and Miller v. City of Tacoma. He and the two judges who joined in his dissent would in effect have interpreted "public use" to mean "public need" or "public purpose." The majority purported to distinguish the two decisions on bases that are not at all convincing. Of Miller, the majority merely commented that it was "an urban renewal case," hardly a principled distinction. In re Port of Seattle was distinguished either on the ground that the cargo handlers served the public or that the cargo handling facilities were only "incidental" to the operation of Sea-Tac Airport. Of course the retail stores in Westlake Mall would also have served the public in the same way, and the handling of air cargo might be said to be as essential to an airport as retail stores are to a public mall or, as the court said in Hogue v. Port of Seattle, "an integral part of an airport operation."

What is lacking, of course, is a reasoned, principled doctrine of public use in Washington. "Law" is not merely the result on the facts of a given case; it is the abstract rule followed and the reasoning that supports it. That is what makes "law," "law," a body of rules that will govern future cases. Suppose the next case asks whether a port district may condemn land for a marina, with moorage slips and shoreside retail establishments to be leased out to private individuals.[FN25] May a city condemn land for an industrial park or business park, to be leased out to private companies?[FN26] What if a city proposes to condemn land to build a public housing project that is not part of an urban renewal project? The writer's view is that Washington's restrictive concept of "public use" is founded upon a misconception of the provision in Article I, Section 16, that "public use" is a "judicial question." It has always been a judicial question. It was a judicial question in Hawaii Housing Authority v. Midkiff[FN27] and Berman v. Parker[FN28] or the Supreme Court could not have decided the issue in those cases. Article I, Section 16

, does not say *how* the judiciary shall define "public use"; it merely says the judiciary *shall* define it. Therefore, Washington courts are as free as any others to define "public use" to mean "public purpose," and the Washington Supreme Court should so define it unless the court is really willing to prohibit public marinas, city industrial parks, and publicly owned housing projects.

A different kind of public-use question than the one just discussed is presented by cases in which it is alleged that a governmental entity seeks to take more land than the proposed project requires. The question is not whether the project is for the public use—we assume it is—but whether some of the land sought is necessary for that, or any, public use. This is the question known as "excess condemnation." Sometimes there are thought to be two questions, one being whether the amount of land sought is more in physical extent than the project requires, and the other question being whether part of the land sought is for an alleged future use that may never occur. Really, however, there is only one question, whether the land is reasonably necessary for the public project. What is required is "reasonable" necessity within a "reasonable" time.[FN29] The short answer to the question is deceptively simple: if the only justification for an eminent domain taking, the only public use or purpose the governmental entity identifies, is a certain project, then of course any land beyond what the project requires will not be taken for even an alleged public use. If we agree that 20 acres and no more are needed for a public park, then of course one more acre or one more square foot are excess. Therefore, the real excess condemnation issue is, who determines how much is too much, and what rules govern the process of determination?

It is up to the condemning agency to determine in the first instance how much land it reasonably needs for its project. And if more land is sought than is immediately to be put to public use, but the agency says it intends to put the rest of the land to public use later, then the excess portion must be put to use within a "reasonable" time.[FN30] The agency's determination is subject to judicial review, but under a standard that is deferential to the agency. Washington has said that the agency's discretion will be disturbed only for "a manifest abuse of discretion, violation of law, fraud, improper motives, or collusion" or for "bad faith, arbitrary, capricious or fraudulent action." [FN31] Detailed and precise plans of the proposed project need not be presented to the court, but only a sufficient description that the court can see the nature of the project, to determine that it is for public use.[FN32]

Washington's already confusing and inconsistent "public use" doctrine was vastly complicated by the important late-1998 Washington Supreme Court decision in State ex rel. Washington State Convention and Trade Center v. Evans (hereafter cited as "Convention Case").[FN33] A state statute authorized the expansion of the state convention center in Seattle, the expansion to occur horizontally at about the fourth-story level only. The legislature appropriated $111.7 million for the expansion, but, as a condition, required the Center to contribute $15 million. After considering an alternative plan, the Center's governing board decided to condemn a parcel of land, already improved with buildings and parking lots, across a street from the existing Center. Those existing improvements were to be razed and an expansion of the Center to be built at approximately the fourth-story level, to be supported by columns and other supporting elements, with much air space among the columns and supports. A critical fact is that the main, if not sole, motivation for this plan was, from its inception, to raise the $15 million contribution by selling the air space below the fourth story to a private developer. This the center proposed to do, having a purchase agreement with a private developer, who intended to use the space for a parking garage and retail stores, in connection with a hotel the developer planned nearby. Condemnees Evans and others challenged the use of eminent domain for this purpose, on the ground that it was not "for public use," as required by Article I, Section 16, Washington Constitution.

In a seven-to-two decision, the supreme court held that the public-use requirement was met. Essentially, the court reasoned that this was a case of condemnation for mixed public (convention center) and private (parking, retailing) uses that was constitutional because the private portion of use was "merely incidental" to the public portion. The majority distinguished In re City of Seattle (In re Westlake),[FN34] which struck down a similar mixed-use condemnation, on the ground that in Westlake a proposed sale or lease of part of the condemned land to retail merchants was "a substantial element" of a larger project, as discussed elsewhere in this section. Hogue v. Port of Seattle,[FN35] which underlay the Westlake decision, was not discussed. A two-judge dissent made several

arguments, the most cogent of which was that this was a case of "excess condemnation" for the purpose of " recoupment" of a part of the cost of the expansion project. Although the dissent's theory seems to fit the case better than the majority's, neither side comes fully to grip with a case that, for subtlety of analysis, almost defies description.

The writer's analysis of the decision is drawn from 2A J. Sackman, *Nichols on Eminent Domain* § 7.06[7][b] through 7.06[7][f] (Rev. 3d ed. 1998); and Annot., *Right to Condemn Property in Excess of Needs for a Particular Public Purpose*, 6 A.L.R.3d 311 (1966). These sources, which will be further cited simply as "*Nichols*" and "*A.L.R.* ," appear to be the most relevant and authoritative general treatments of the subject. They each cite numerous judicial decisions and statutes, which may be examined for further research.

This is a case of "excess condemnation" and should have been analyzed as such. The Center's board did condemn more land than its public project would use, and it did plan to sell off the excess to a private party. But that is not the end of the analysis, for there are several kinds of "excess condemnation," distinguished by the reasons for them, and at least two of these kinds are intertwined here. So-called "remnant" excess condemnation, in its classic form, involves this fact pattern: For some public project, a governmental entity condemns one or more whole parcels of land, the total area being in excess of what is needed for the project. Reasons a condemnor would do this vary; a typical one is that the remnants left would have been of so little value to their owners that to leave them out would have saved a negligible amount of compensation. After all the land that is needed for the project is used, a remnant remains that is of no use to the governmental entity. However, the sources cited above do not mention that the excess land is sold. "Remnant" excess condemnation has generally been upheld, but in the cases cited in *Nichols*, it appears a state constitution or statute authorized the practice. Up to a point, then, "remnant" excess condemnation describes what occurred in the Convention case: in order to condemn the fourth story of the desired property, it was practically necessary to condemn the lower levels and airspace above, *i.e.*, the whole parcel. But some of the excess portion was sold, which does not seem to be the pattern in the "remnant" cases, nor was there specific statutory authority for excess condemnation.

The other kind of excess condemnation that is intertwined in the Convention case is called the "recoupment" theory. Under this theory the condemnor takes more land than is needed for the project, with the preconceived purpose of selling the excess for a profit to help pay for the project. Both *Nichols* and *A.L.R.* indicate that, while the technique has been little used in America (*Nichols* says it is used more in Europe), and there is sparse American case law on the subject, most American courts have held that it violates the constitutional requirement of public use. *Nichols* cites as the leading decision for this position Cincinnati v. Vester,[FN36] a 1930 United States Supreme Court decision. A minority of state decisions have approved the technique. "Recoupment" excess condemnation also fits the facts of the Convention case, as there was a preconceived plan to condemn land below the fourth story for the purpose of selling it to raise the required $15 million for the expansion of the convention center.

It is the writer's conclusion that "recoupment" condemnation was the dominant form of excess condemnation in the Convention case. "Remnant" excess condemnation does not as completely fit the facts because there was no statute authorizing it, and the excess part was sold. It therefore appears that the majority opinion in the Convention case has followed the minority position of American courts, though the majority opinion failed to analyze the case as one of recoupment condemnation. It is especially noteworthy that Washington would follow that position, given the strong "public use" language in Article I, § 16, of the state constitution. The dissenting opinion follows a majority of the American decisions on "recoupment" excess condemnation, but would have been more complete if it had also discussed the intertwined "remnant" theory. Whether one agrees with the majority or dissent, surely all will agree that the Convention decision has further complicated Washington's already complicated and confused " public use" doctrine.

Compounding the confusion caused by Washington's *Convention Center* decision, just reported, is the state supreme court's 2005 decision in *HTK Management, L.L.C. v. Seattle Popular Monorail Authority*.[FN36.05] The

Seattle Monorail Authority sought to condemn all the land occupied by a privately owned parking garage, known euphemistically from its shape as the "sinking ship garage," which was located adjacent to the Pioneer Square district of Seattle. It was clear that all or nearly all of the condemned land was needed for the period of construction of a monorail station to be located on part of it. What was not clear—and what is the factual nub of the case—was that, after the period of construction, some portion of the land *would or might* not be necessary for monorail purposes, and if not so necessary, *might be sold to a private owner for private development.* Both the court's majority and dissent thus assumed that the legal-factual issue was, if—*if*—the surplus land *were* thus sold, *i.e.*, *assuming* the surplus was to be thus sold, would the taking of *that surplus part* be "for public use." Whereas, in *Kelo v. City of New London*, just discussed in this treatise, the courts *knew* the land condemned *would* be resold to private developers, in *HTK Management* the Washington Supreme Court had to *assume* some condemned land *would be* sold privately. But, whether the issue was stated as a *known* fact or as a *hypothetically supposed* fact, the *legal issue* is the same. And Washington answered the same as had the Supreme Court of Connecticut and the Supreme Court of the United States in *Kelo v. City of New London*: the taking of land to be resold to a private owner for private development is, or may be, "for public use." *HTK Management* is very close to the Washington Supreme Court's prior decision in *State ex rel. Washington State Convention and Trade Center v. Evans*, reported earlier in this section of this treatise. But *HTK Management* goes farther than the *Trade Center* decision in this respect: In *Trade Center*, the surplus land was planned to be sold off *to help pay for the construction of the expansion of the trade center*, thus making the condemnation—probably—fit into the character of "excess condemnation for the purpose of recoupment." But in *HTK Management*, as far as the court tells us, the funds that could be produced by sale of the land that was surplus for the monorail station would not be limited to paying for construction of that station or for any stated purpose. In that respect, Washington's decision in *HTK Management* goes a step (half step?) beyond *Trade Center*: just as, in *Kelo v. New London*, the city could condemn private land for resale to private developers, with the funds thus produced going into the city's (or monorail authority's) general fisc. Not much is left of Washington's supposed strict rule that condemnation may be used only to acquire land for use by the public.

A question that may be said to be the opposite of the "public use" question discussed so far in this section is, if a state agency engages in an activity that is *not for public use* (sometimes called a "proprietary use") but would cause a "taking" if it were for public use, is eminent domain compensation due? That was the issue in a 2003 Washington Court of Appeals decision, Dickgieser v. State.[FN37] The Department of Natural Resources (DNR) logged some state-owned land, the logs to be sold to provide funds for public schools. This logging caused a stream to flood the plaintiffs' lands, and it appears to have been accepted by the court that the flooding would have caused an inverse condemnation if the state's logging was for a "public use." The court of appeals held the logging was not for a "public use" and that therefore no compensation was due the plaintiffs. There is, of course, a substantial question whether a state agency's logging state lands to provide funding for public schools is not for a " public use." On this question alone, one might argue that the decision tends to be contrary to the Convention case, just discussed, in that the latter must have found a public use in the application of the funds generated by the excess condemnation. A further serious question, which the court does not really plumb, is whether the words "for public use" were intended, as they have been understood in previous Washington decisions, to be a limitation on governmental power to engage at all in a given activity, rather than, as applied in Dickgieser v. State, a limitation on the state's duty to pay compensation if it does engage in an activity that causes damage to private lands. Also, it seems that, if DNR was acting in a "proprietary" capacity, similar to what a private person would do, the artificial collecting, channeling, or diversion of surface water onto the plaintiffs' lands may well have been a tortious act. Yet the court said that, though the plaintiffs argued that question, "Because we find that there was no public use, we need not discuss that issue." In defense of the court's cursory handling of some substantial questions, we must consider that Washington's courts of appeals are deluged with a flood of cases—and far more than cases of flooding of private lands.

[FNa0] Judson Falknor Professor of Law Emeritus, University of Washington, Of Counsel, Karr Tuttle Campbell, Member of the Washington Bar.

[FNa1] Professor of Law, Seattle University, Member of the Washington Bar.

[FN1] See Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L. J. 599 (1949).

[FN2] See In re City of Seattle (In re Westlake Project), 96 Wn.2d 616, 638 P.2d 549 (1981), which held that the city could not condemn land to be leased to store owners because the premises would not be a public area. Compare Miller v. City of Tacoma, 61 Wn.2d 374, 378 P.2d 464 (1963), which upheld the condemnation of land, to be sold to private developers for urban renewal purposes.

[FN3] Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984).

[FN4] Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954). Michigan's celebrated decision in Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981), is sometimes offered as the extreme example of one "pole" of the public use doctrine. The city was allowed to condemn land to be turned over to General Motors for an assembly plant, on the ground that this would serve the public by providing jobs.

[FN4.05] Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981).

[FN4.10] County of Wayne v. Hathcock, 471 Mich. 445, 684 N.W.2d 765 (2004).

[FN4.15] Kelo v. City of New London, 268 Conn. 1, 843 A.2d 500 (2004), cert. granted, 542 U.S. 965, 125 S. Ct. 27, 159 L. Ed. 2d 857 (2004).

[FN4.20] Kelo v. City of New London, Conn., 125 S. Ct. 2655, 162 L. Ed. 2d 439 (U.S. 2005). Of peripheral interest, and remote relation to *Kelo* (though perhaps a harbinger of things to come), was the Supreme Court's slightly earlier decision in Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). The Court said that a Hawaii statute, which limited the rent that oil companies could charge dealers who leased company-owned premises, did not implicate the "Taking Clause" and held it was not a violation of due process.

[FN4.25] Kelo v. City of New London, Conn., 125 S. Ct. 2655, 2671–2687, 162 L. Ed. 2d 439 (U.S. 2005).

[FN4.30] The author of this section has been writing, speaking, and teaching extensively on various aspects of the Fifth Amendment's "Takings Clause" since 1966. During that time a number of important–famous–Supreme Court decisions on "takings" have come down. Some of them are more important to legal scholars than is *Kelo v. New London*. Yet, your author cannot remember any of those famous decisions that has caused so many persons—ordinary citizens—to strike up a conversation, usually an anguished one, with him as has *Kelo*. Justice O'Connor, in her dissent, emphasized a concern that can be understood and sympathized in by any sentient person: that large, powerful interests that desire to have the lands of "ordinary humble citizens" for development will use their influence with local governments to obtain those lands by condemnation.

[FN5] See especially In re City of Seattle (In re Westlake Project), 96 Wn.2d 616, 638 P.2d 549 (1981).

[FN6] See, e.g., City of Des Moines v. Hemenway, 73 Wn.2d 130, 437 P.2d 171 (1968); King County v. Farr, 7 Wn.App. 600, 501 P.2d 612 (1972).

[FN7] In re City of Seattle (In re Westlake Project), 96 Wn.2d 616, 638 P.2d 549 (1981).

[FN8] Hogue v. Port of Seattle, 54 Wn.2d 799, 341 P.2d 171 (1959).

[FN9] See In re Port of Grays Harbor, 30 Wn.App. 855, 638 P.2d 633 (1982), which upheld a port district's condemnation for an industrial park, under authority of amendment 45 and of enabling legislation adopted pursuant to it.

[FN10] State v. Belmont Improvement Co., 80 Wn.2d 438, 495 P.2d 635 (1972).

[FN11] Town of Steilacoom v. Thompson, 69 Wn.2d 705, 419 P.2d 989 (1966).

[FN12] See § 9.4, supra, and see especially City of Des Moines v. Hemenway, 73 Wn.2d 130, 437 P.2d 171 (1968), and State ex rel. King County v. Superior Court, 33 Wn.2d 76, 204 P.2d 514 (1949).

[FN13] State v. Belmont Imp. Co., 80 Wn.2d 438, 495 P.2d 635 (1972); State ex rel. Sternoff v. Superior Court, 52 Wn.2d 282, 325 P.2d 300 (1958).

[FN14] State ex rel. Tacoma School Dist. No. 10 v. Stojack, 53 Wn.2d 55, 330 P.2d 567 (1958).

[FN15] City of Spokane v. Merriam, 80 Wash. 222, 141 P. 358 (1914).

[FN16] City of Tacoma v. Welcker, 65 Wn.2d 677, 399 P.2d 330 (1965).

[FN17] Public Utility Dist. No. 1 v. Washington Water Power Co., 43 Wn.2d 639, 262 P.2d 976 (1953); State ex rel. Northwestern Electric Co. v. Superior Court, 28 Wn.2d 476, 183 P.2d 802 (1947); Carstens v. Public Utility Dist. No. 1, 8 Wn.2d 136, 111 P.2d 583 (1941).

[FN18] Town of Steilacoom v. Thompson, 69 Wn.2d 705, 419 P.2d 989 (1966).

[FN19] Marshland Flood Control Dist. v. Great Northern Ry., 71 Wn.2d 365, 428 P.2d 531 (1967).

[FN20] State ex rel. Henry v. Superior Court, 155 Wash. 370, 284 P. 788 (1930).

[FN21] City of Des Moines v. Hemenway, 73 Wn.2d 130, 437 P.2d 171 (1968).

[FN22] Miller v. City of Tacoma, 61 Wn.2d 374, 378 P.2d 464 (1963).

[FN23] City of Seattle v. Loutsis Investment Co., 16 Wn.App. 158, 554 P.2d 379 (1976).

[FN24] In re Port of Seattle, 80 Wn.2d 392, 495 P.2d 327 (1972).

[FN25] Of course such publicly owned marinas exist in Washington, the largest being Shilshole Bay Marina, operated by the Port of Seattle. In fact, City of Des Moines v. Hemenway, 73 Wn.2d 130, 437 P.2d 171 (1968), held that the city had power to build such a marina, but the court noted that the parties did not argue the public use issue on appeal.

[FN26] Amendment 45 to the state constitution applies only to port-district industrial parks.

[FN27] Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984).

17 Wash. Prac., Real Estate § 9.20 (2d ed.)

[FN28] Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954).

[FN29] In re Port of Seattle, 80 Wn.2d 392, 495 P.2d 327 (1972).

[FN30] State ex rel. Union Trust & Savings Bank v. Superior Court, 84 Wash. 20, 145 P. 999 (1915), affirmed 84 Wash. 20, 149 P. 324 (1915).

[FN31] State ex rel. Lange v. Superior Court, 61 Wn.2d 153, 157, 377 P.2d 425 (1963) ("bad faith," etc.); State ex rel. Tacoma School Dist. No. 10 v. Stojack, 53 Wn.2d 55, 64, 330 P.2d 567 (1958) ("manifest abuse," etc.).

[FN32] State ex rel. Lange v. Superior Court, 61 Wn.2d 153, 157, 377 P.2d 425 (1963).

[FN33] 136 Wn.2d 811, 966 P.2d 1252 (1998).

[FN34] In re City of Seattle (In re Westlake), 96 Wn.2d 616, 638 P.2d 549 (1981).

[FN35] Hogue v. Port of Seattle, 54 Wn.2d 799, 341 P.2d 171 (1959).

[FN36] Cincinnati v. Vester, 281 U.S. 439, 50 S.Ct. 360, 74 L.Ed. 950 (1930).

[FN36.05] HTK Management, L.L.C. v. Seattle Popular Monorail Authority, 155 Wash. 2d 612, 121 P.3d 1166 (2005).

[FN37] Dickgieser v. State, 118 Wn.App. 442, 76 P.3d 288 (Div. 2, 2003), reversed, Dickgieser v. State, 118 Wn.App. 442, 76 P.3d 288 (Div. 2, 2003).



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Chapter 9. Eminent Domain
B. Constitutional Limitations

## § 9.21. Just compensation—In general

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C.J.S., Eminent Domain § 178

C.J.S., Eminent Domain § 184

C.J.S., Eminent Domain §§ 198 to 200

Both the federal and Washington state constitutions require that eminent domain takings be upon "just compensation."[FN1] The duty to pay compensation should be viewed as a limitation upon governmental exercise of eminent domain power: government may take, but government must pay. Historically, as far back as we can find authority in Anglo-American law, governments have been expected to pay landowners for their losses occasioned by expropriation of real property interests. No English or American colonial decision is known from before the time of the American Revolution that expressly said or held that compensation was required. However, in every instance that can be documented from that era, it was the consistent practice of the English government and of

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American colonies to award compensation for the taking of land for public projects, such as roads, bridges, and buildings. Thus, when the fifth amendment included the phrase "just compensation," it was in recognition of an accepted uniform practice.

Underlying the duty to pay compensation is the old concept of "just share," that a given citizen should bear his just share of the costs of government. Living in a governed society imposes many kinds of costs upon its citizens, including of course the surrender of many personal freedoms. However, government does not attempt to compensate individuals for these widely shared costs, on the theory that, because they are more or less equally shared, gains and losses balance out. Taxation poses an interesting problem because taxes are not always evenly distributed, a phenomenon that can especially be seen with property taxes and a graduated income tax. But, aside from the practical problem that to even up tax contributions would destroy the taxing system, the uneven imposition of taxes is usually justified on the theory that those who pay more taxes receive more protection and benefits from government. With eminent domain, however, which irregularly and discriminatorily deprives a few individuals and not others of specific property, we believe that the principle of just share requires us to compensate them, to restore them to equality.[FN2]

At the practical working level, questions of just compensation are the only issues in the large bulk of eminent domain cases. In the typical eminent domain case, especially in those that do not progress to the appellate level, there is no serious question that government proposes to exercise its power of eminent domain nor that the case is one in which the power may be exercised. Rather, the ultimate questions usually are how much is due the condemnee. What items are compensable? What is the proper measure of compensation for these items? What kinds of evidence are admissible to establish the amount of compensation? What amount of compensation does the evidence justify? The next several sections deal with those questions.

To open the door just a crack on the next several sections, here are several of the most fundamental principles of compensation: As implied in our previous discussion of property rights that are subject to condemnation, in the absence of a special statute allowing other forms of compensation, an owner is constitutionally entitled to be compensated only for losses of "property," not for other losses such as business losses, moving costs, or so-called condemnation blight.[FN3] Compensation must be paid in money.[FN4] Compensation is in the amount of the owner's loss, not the amount of the government's gain.[FN5] Though compensation is for the owner's loss, the amount of compensation is measured by a neutral standard, the fair market value of the loss, not by the idiosyncratic loss to the particular owner.[FN6] Details about the measure of compensation in various situations and about special forms of compensation will be covered in the next five sections.

[FNa0] Judson Falknor Professor of Law Emeritus, University of Washington, Of Counsel, Karr Tuttle Campbell, Member of the Washington Bar.

[FNa1] Professor of Law, Seattle University, Member of the Washington Bar.

[FN1] U.S. Const. 5th Amend.; Wash. Const. Art. I, § 16.

[FN2] See Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 572–88 (1972), for explication of the ideas in the first two paragraphs.

[FN3] See Greenwood v. City of Seattle, 73 Wn.2d 741, 440 P.2d 437 (1968) (architectural and engineering expenses not recoverable). Washington has special statutes that to some extent do allow awards for courts costs, including reasonable attorneys' fees and witness fees; relocation costs; and

replacement housing for homeowners and tenants. See RCWA Chapter 8.25 and RCWA Chapter 8.26. These special statutory forms of compensation will be discussed in § 9.25, infra.

[FN4] The following statutes require compensation in "money": RCWA 8.04.010 (eminent domain by state); RCWA 8.08.010 (eminent domain by counties); RCWA 8.16.020 (eminent domain by school districts); RCWA 8.20.010 (eminent domain by corporations). Also, RCWA Chapter 8.12, governing eminent domain by cities, while it does not use the word "money," implies payment in money by repeated use of such words as "paid" and "funds."

[FN5] See State v. Larson, 54 Wn.2d 86, 338 P.2d 135 (1959); State v. Wilson, 6 Wn.App. 443, 493 P.2d 1252 (1972).

[FN6] See, e.g., City of Medina v. Cook, 69 Wn.2d 574, 418 P.2d 1020 (1966); State v. Larson, 54 Wn.2d 86, 338 P.2d 135 (1959); State v. Wilson, 6 Wn.App. 443, 493 P.2d 1252 (1972).





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Chapter 21. Regulatory Takings

## § 21.2. Relationship between state and federal law of takings

**West's Key Number Digest**

West's Key Number Digest, Eminent Domain ⚿2.10, 2.27

The takings analysis formulated by the Washington Supreme Court is an attempt to conform Washington law to recent rulings by the United States Supreme Court.[FN1] Achieving consistency between state and federal law is necessary because the state courts must decide takings claims raised under the Fifth Amendment to the United States Constitution.[FN2] The opinions of the Washington Supreme Court in three cases, Presbytery,[FN3] Sintra[ FN4] and Robinson,[FN5] represent an effort by the Washington court to develop a single structural test to replace earlier ad hoc decision-making. However, because the United States Supreme Court itself has never fashioned a systematic takings test, whether the Washington court has succeeded in doing so may not be known for many years.

Much of the uncertainty in the area of regulatory takings stems from the Supreme Court's own ad hoc decision-making. In 1987, the United States Supreme Court issued three significant regulatory takings decisions with which the Washington court first began to grapple in Orion II.[FN6] This federal trilogy is composed of Nollan v. California Coastal Commission;[FN7] First English Evangelical Lutheran Church v. County of Los Angeles;[FN8] and Keystone Bituminous Coal Association v. DeBenedictis.[FN9] Presbytery represents a conscious effort by the Washington court to synthesize this recent line of United States Supreme Court authority into a test for constitutional takings claims to be employed by the Washington courts.

The Washington cases acknowledge the relatively undeveloped character of this state's takings test and the difficulty presented by attempting to distill the recent Supreme Court decisions into a workable analysis. In Robinson, the Court acknowledged "this state's current rule on the law of inverse condemnation has only recently taken shape, and both this case and that of Sintra ... are opportunities for this court to apply the recently adopted analysis."[FN10]

In Orion II, the Court said that "articulating a doctrinally consistent, definitive test has proved an elusive goal, sometimes characterized as "the 'lawyer's equivalent of the physicist's hunt for the quark.' "[FN11] The Court also commented on the shifting and confused state of federal law in this area:

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> In its recent trio of takings decisions, the Supreme Court attempted to settle various aspects of the controversy surrounding the federal regulatory takings doctrine [citations omitted]. Despite these attempts, the definitive answers, so necessary for state courts to make reasoned determinations concerning minimum federal due process requirements, remain unavailable. Our task is complicated further by the ambiguities contained in recent Supreme Court decisions and by the fact that despite a 3-month separation, recent cases do not cite each other.[FN12]

Presbytery and related Washington Supreme Court decisions are controlling law and are binding on Washington courts deciding regulatory taking claims under the Fifth Amendment. This chapter summarizes the Washington law of Fifth Amendment takings, but does not undertake to evaluate the fit between the Washington authority and United States Supreme Court takings jurisprudence. That task is beyond the scope of a practice manual.

The Washington courts also decide takings claims under the Washington Constitution.[FN13] Although the Washington Supreme Court has characterized the federal constitution as establishing "a minimum floor of protection below which state law may not go,"[FN14] Washington jurisprudence has not clarified whether the state's constitution might provide greater protection than that afforded by the Fifth Amendment to a property owner burdened by regulatory action. The references to minimal federal standards leave open the possibility that Washington will establish more restrictive rules for regulation of private property. Separately pleading a state takings claim will preserve a contention that Washington's law of inverse condemnation has a more extensive reach than federal law. Because state constitutional standards have not yet been elaborated separately from federal standards, this chapter does not attempt to examine the two sources of takings law separately.

In Manufactured Housing v. State,[FN15] the Washington Supreme Court held, "the structural differences allow Washington courts to forbid the taking of private property for private use even in cases where the [Federal] Fifth Amendment may permit such takings."[FN16] The Court elaborated that "private use" under Washington's constitution is defined more literally than under the Federal Fifth Amendment. Further, Washington's interpretation of "public use" is more restrictive than the Federal Fifth Amendment.[FN17]

[FNa0] Seattle, Washington.

[FNa1] Editor-In-Chief.

[FNa2] Contributor to Pocket Part.

[FN1] Presbytery of Seattle v. King County, 114 Wash. 2d 320, 328, 787 P.2d 907, 911 (1990).

[FN2] Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987), cert. denied, 486 U.S. 1022, 109 S. Ct. 1996, 100 L. Ed. 2d 227 (1998) (Orion II). The Court stated, "Due to recent events, however, we want to ensure that our state approach conforms with the minimum due process floor set by the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment. " Orion Corporation v. State, 109 Wn.2d at 652.

[FN3] Presbytery of Seattle v. King County, 114 Wash. 2d 320, 787 P.2d 907 (1990), cert. denied, 486

U.S. 1022, 109 S. Ct. 1996, 100 L. Ed. 2d 227 (1998).

[FN4] Sintra, Inc. v. City of Seattle, 119 Wash. 2d 1, 829 P.2d 765 (1992).

[FN5] Robinson v. City of Seattle, 119 Wash. 2d 34, 830 P.2d 318 (1992).

[FN6] See Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062, 1074, (1987), cert. denied, 486 U.S. 1022, 108 S. Ct. 1996, 100 L. Ed. 2d 227 (1988).

[FN7] Nollan v. California Coastal Com'n, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

[FN8] First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal., 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

[FN9] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987).

[FN10] Robinson v. City of Seattle, 119 Wash. 2d 34, 47, 830 P.2d 318, 326 (1992).

[FN11] Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062, 1075 (1987), cert. denied, 486 U.S. 1022, 109 S. Ct. 1996, 100 L. Ed. 2d 227 (1988), citing Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 199, n.17, 105 S. Ct. 3108, 3123, n.17, 87 L. Ed. 2d 126 (1985).

[FN12] Orion Corp. v. State, 109 Wash. 2d 621, 653, 747 P.2d 1062, 1079 (1987) (footnote omitted), cert. denied, 486 U.S. 1022, 108 S. Ct. 1996, 100 L. Ed. 2d 227.

[FN13] Orion Corp. v. State, 109 Wash. 2d 621, 645, 747 P.2d 1062, 1075 (1987), cert. denied, 486 U.S. 1022, 108 S. Ct. 1996, 100 L. Ed. 2d 227. Wash. Const. Article I, Section 16 provides in relevant part: " [N]o private property shall be taken or damaged for public or private use without just compensation having been first made."

[FN14] Orion Corp. v. State, 109 Wash. 2d 621, 652, 747 P.2d 1062, 1078 (1987), cert. denied, 486 U.S. 1022, 108 S. Ct. 1996, 100 L. Ed. 2d 227.

[FN15] Manufactured Housing Communities of Washington v. State, 142 Wash. 2d 347, 13 P.3d 183 (2000).

[FN16] Manufactured Housing Communities of Washington v. State, 142 Wash. 2d 347, 13 P.3d 183 (2000).

[FN17] Manufactured Housing Communities of Washington v. State, 142 Wash. 2d 347, 13 P.3d 183 (2000).



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